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## **The Catalan Independence referendum: An assessment of the process of self-determination**

Turp, Daniel ; Caspersen, Nina ; Qvortrup, Matt ; Welp, Yanina

**Abstract:** This report addresses different aspects of the proposed referendum in Catalonia. In chapter one, Professor Yanina Welp analyzes and presents a political sociological perspective on the respective evolutions of the Catalan support for or rejection of independence. This chapter also summarizes the events that led to the demand for a referendum. In chapter two, Professor Nina Caspersen presents a comparative and historical overview of the political context of the demand for independence for Catalonia and draws up a number of scenarios for the future, depending on the outcome of the referendum. In the subsequent chapter, Professor Matt Qvortrup analyzes when referendums are held and what determines their outcome; as well, he analyzes the legislation governing the conduct of the proposed referendums. He concludes, with some reservations, that the current legislation meets international standards. Finally, Professor Daniel Turp analyzes and assesses the legality of the proposed referendum. Professor Daniel Turp examines the right to decide of the people of Catalonia in light of rules found in international, European, Spanish, Catalan and comparative law.

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KNOWLEDGE,  
EDUCATION  
AND DIALOGUE



# REPORT OF THE INTERNATIONAL GROUP OF EXPERTS.

THE CATALAN INDEPENDENCE  
REFERENDUM : AN ASSESSMENT OF THE  
PROCESS OF SELF-DETERMINATION

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# TABLE OF CONTENT

Summary .....	1
Acknowledgements .....	2
List of Abbreviations and Acronyms .....	3
Introduction .....	4
The Right To Decide? The Catalans' Dilemma – Yanina Welp .....	5
The Catalan Independence Referendum: Conflicting Claims and International Responses— Nina Caspersen .....	21
A Comparative Perspective on Referendums on Independence and the Proposed Catalan Referendum of October 1st, 2017 – Matt Qvortrup .....	37
Catalonia's "Right To Decide" under International, European, Spanish, Catalan and Comparative Law – Daniel Turp .....	55
Conclusion .....	73
Annex— The Law On The Self-Determination Referendum (project).....	75
About the Report of the International Group of Experts .....	88
About the IRAI .....	89

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# SUMMARY

This report addresses different aspects of the proposed referendum in Catalonia. In chapter one, Professor Yanina Welp analyzes and presents a political sociological perspective on the respective evolutions of the Catalan support for or rejection of independence. This chapter also summarizes the events that led to the demand for a referendum. In chapter two, Professor Nina Caspersen presents a comparative and historical overview of the political context of the demand for independence for Catalonia and draws up a number of scenarios for the future, depending on the outcome of the referendum. In the subsequent chapter, Professor Matt Qvortrup analyzes when referendums are held and what determines their outcome; as well, he analyzes the legislation governing the conduct of the proposed referendums. He concludes, with some reservations, that the current legislation meets international standards. Finally, Professor Daniel Turp analyzes and assesses the legality of the proposed referendum. Professor Daniel Turp examines the right to decide of the people of Catalonia in light of rules found in international, European, Spanish, Catalan and comparative law.

Le présent rapport aborde les différents aspects du référendum annoncé en Catalogne. Au chapitre un, la professeure Yanina Welp analyse et présente un point de vue politique et sociologique des évolutions respectives du soutien et du rejet catalans relativement à l'indépendance. Ce chapitre résume aussi les événements qui ont mené les Catalans à demander un référendum. Au chapitre deux, la professeure Nina Caspersen présente un aperçu comparatif et historique du contexte politique lié à la demande d'indépendance de la Catalogne et établit un certain nombre de scénarios pour l'avenir, selon les résultats du référendum. Dans le chapitre suivant, le professeur Matt Qvortrup analyse les moments où des référendums sont organisés et les facteurs qui déterminent les résultats; de plus, il analyse la loi qui régit la tenue des référendums proposés. Il conclut, avec quelques réserves, que la loi actuelle répond aux normes internationales. Enfin, le professeur Daniel Turp analyse et évalue la légalité du référendum proposé. Il étudie le droit de décider des habitants de la Catalogne à la lumière des règles que l'on retrouve dans le droit international, européen, espagnol, catalan et comparé.

L'informe aborda diferents aspectes relatiu al referèndum proposat a Catalunya. Al primer capítol, la Doctora Yanina Welp analitza i presenta una perspectiva política i sociològica de l'evolució del suport o l'oposició a la independència per part del poble català. Així mateix, el capítol s'encarrega de resumir la cronologia d'esdeveniments que han propiciat la petició d'un referèndum. Al segon capítol, la catedràtica Nina Caspersen exposa una visió de conjunt comparativa i històrica del context polític de la demanda d'independència de Catalunya i formula una sèrie d'hipòtesis de futur en funció del resultat del referèndum. Al capítol que segueix, el catedràtic Matt Qvortrup estudia quan i en quines condicions se celebren els referèndums i què en determina els resultats; alhora, analitza la legislació que regeix els elements clau dels referèndums proposats. Conclou, amb algunes reserves al respecte, que la legislació actual compleix els estàndards internacionals. Per últim, el catedràtic Daniel Turp analitza i avalua la legalitat del referèndum proposat, i examina el dret a decidir del poble català tenint en compte la legislació internacional, europea, espanyola, catalana i el dret comparat.

# ACKNOWLEDGMENTS

On behalf of the Institute for Research on Self-Determination of Peoples and National Independence (IRAI), I would like to express my appreciation to all those who have been involved in the preparation of this report. The IRAI is particularly grateful to the three academics who have agreed to be associated with our new Institute: Nina Caspersen, Yanina Welp and Matt Qvortrup, and with whom I had the pleasure, as their rapporteur, to write this report. I would like to express special thanks to our researcher Anthony Beauséjour, who participated in the deliberations of the group and competently assisted its members and the rapporteur in the preparation of their contributions.

The group also expresses its deep appreciation to the IRAI Research Coordinator, Frida Osorio Gonsen, for the phenomenal work she devoted to the preparation of the present report. The revision and translation of the report fall under her responsibility, a responsibility which she has exercised with great efficiency.

I would also like to thank the IRAI's Director General, Geneviève Baril, who also played a decisive role in defining the mandates of the members of the group of international experts and in implementing a project of which she is, in the end, the ideator. She must also be thanked for organizing the dissemination of this report, both in Catalonia and in Québec, in conjunction with the invaluable assistance of Philippe Leclerc and Élisabeth Émond of Nestor Stratégie.



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Daniel Turp  
Rapporteur

# LIST OF ABBREVIATIONS

BNG	Galician Nationalist Bloc	PCE	Communist Party of Spain
Cs	Citizens	PDC	Democratic Pact for Catalonia
CC	Canarian Coalition	PDeCAT	Catalan European Democratic Party
CDC	Democratic Convergence of Catalonia	PNV	Basque Nationalist Party
CiU	Convergence and Union	S.C.	Statutes of Canada
CSQP	Catalonia Yes We Can	S.C.R.	Supreme Court Reports (Canada)
CQLR	Compilation of Québec Laws and Regulations	Sess.	Session
CUP	Popular Unity Candidacy	Supp.	Supplement
DC	Democrats of Catalonia	TC	Spanish Constitutional Tribunal
Doc.	Document	TFUE	Treaty on the Functioning of the European Union
ERC	Republican Left of Catalonia	TS	Treaty Series (United States of America)
ICJ	International Court of Justice	TUE	Treaty on the European Union
ICV-EUiA	Initiative for Catalonia Greens-United and Alternative Left	UCD	Union of the Democratic Centre
IU	United Left	UK	United Kingdom
ILM	International Legal Materials	UN	United Nations
MES	Left Movement	UNGAOR	United Nations General Assembly Official Records
OJ	Official Journal (European Union)	UNTS	United Nations Treaty Series
PP	Popular Party		
PSC	Catalan Socialist Party		
PPC	Catalan People's Party		
PSOE	Spanish Socialist Workers Party		



# I. INTRODUCTION

**As an independent research institute whose mandate is to produce research accessible to all citizens of Quebec and the world on the issues relating to self-determination of peoples and national independence, the IRAI considers the process of determination of Catalonia's political status which is currently underway and the referendum to be held on October 1, 2017 as deserving of particular attention.**

This referendum is part of a larger process that explicitly invokes the right of peoples to self-determination enshrined in the Charter of the United Nations and other international treaties and instruments. This right is referred to in the draft Law on the Self-Determination Referendum (Llei del Referèndum d'autodeterminació) that was presented to the Catalan Parliament on July 31, 2017, and which was therefore made public at the midpoint of the group's work. This draft law provides that the Catalan people will be invited to exercise this right by choosing the path of independence. The question to which the voters will be asked to answer will be the following: "Do you want Catalonia to be an independent State in the form of a republic?"

Due to the importance of the issues surrounding this forthcoming referendum, the IRAI has considered it appropriate to form an international group of experts and has given it the mandate to examine the historical, political and legal aspects of the self-determination process initiated by the Parliament and the Government of Catalonia, and to look in particular into the norms and rules contained in the draft Law on the Self-Determination Referendum.

The international group of experts is composed of four academics, of several nationalities and different backgrounds, with diverse expertise on issues of self-determination and independence. The general terms of reference for the group were to examine the context in which the process of self-determination of the Catalan people has been taking place. The specific terms of reference of the four experts were as follows:

**Yanina Welp (Argentina, University of Zurich):** examination of the historical context of Catalonia's process of self-determination in Catalonia and the issue of the popular support to such process;

**Nina Caspersen (Denmark, University of York):** examination of the the conflict surrounding the process of self-determination in Catalonia, the international responses to this conflict as well the possible impacts of the proposed referendum;

**Matt Qvortrup (United Kingdom, University of Coventry):** examination of international referenda experiences and assessment of the Catalan draft Law on the Self-Determination Referendum in the context of such experiences; and

**Daniel Turp (Québec-Canada, Université de Montréal):** examination of the legal context underlying the process of self-determination of the Catalan people, from the perspectives of international, European, Spanish, Catalanian and comparative law.

The IRAI expresses the hope that this report will contribute to the ongoing debate on self-determination and independence in Catalonia in a constructive manner.

## II. THE RIGHT TO DECIDE ? THE CATALANS' DILEMMA

**Yanina WELP**

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1. **Introduction**
2. **The Spanish Transition to Democracy and the New Territorial Arrangement**
3. **The Electoral Arena**
4. **The End of the Accommodation Strategy**
5. **The Social Support for Independence and/ or a Referendum**
6. **Economic Crisis, Corruption Scandals and International Support**
7. **On the Way to October 1**
8. **Conclusions**

### **1. Introduction**

The scenario created after the regional elections of 27 September, 2015, defined by the Catalan pro-independence parties as “plebiscitarian,” radically changed the political options available for Catalan citizens. The pro-independence platform Together for Yes (Junts pel sí), the result of the electoral alliance among the centre-right Democratic Convergence of Catalonia (CDC) and the left-wing Republican Left of Catalonia (ERC), the Democrats of Catalonia (DC) and the Left Movement (MES), won the election, obtaining 62 seats. But, contrary to their expectations, they failed to gain an absolute majority. Then, Together for Yes arrived at an agreement with the radical left-wing grassroots and pro-independence Popular Unity Candidacy (Candidatura d'Unitat Popular, CUP), which had a historical election this September, winning 10 seats at the regional level. All the pro-independence parties together came to 72 seats out of a total of 135, leaving room to start the process of “disconnection” (desconnexió) from Spain promised by these parties during the electoral campaign.

Accordingly, on November 9, 2015, the parties presented the Declaration of the Initiation of the Process of Independence of Catalonia, which “won't be subject to Spanish institutions' decisions, particularly those from the Spanish Constitutional Court” (see *Catalan News*, November 9, 2015). All the other groups voted against the declaration: Citizens (Ciutadans, Cs), the Catalan Socialist Party (Partit Socialista de Catalunya, PSC), the Catalan People's Party (Partit Popular de Catalunya, PPC) and the alternative-left coalition Catalunya Sí que es Pot (*Vilaweb*, November 9, 2015).

This report focuses on the evolution of the Catalan support of independence and/or the demand for a referendum on the topic, both rising in Catalonia since the early 2000s and becoming a real political challenge for the Spanish government since 2010. If, in the past, support for independence was just a matter of speculation or based on future potential scenarios, since January 2016—when the new government of the *Generalitat* headed by Carles Puigdemont finally assumed office—it became part of the political agenda with a unilateral referendum that was not interna-



tionally recognized announced for October 1, 2017. Even if it is hard to anticipate the short-term success of such a movement, it allows us to explore the likely electoral support of a referendum in case it happens. Or, in other words, what could be expected in terms of turnout and options for the Yes and the No side under these specific conditions?

Political preferences are shaped by many factors. The Spanish legal framework particularly, as well as historical patterns, is key to framing citizens' support or rejection of the right to self-determination and the option for independence. As concerns the legal framework, a referendum on self-determination is not allowed by the Spanish Constitution of 1978 and there has been neither an agreement nor the international support to call such a referendum on a legal basis. Even if a legal framework could be eventually discussed and agreed upon, as happened in similar democratic settings, such as Quebec (1980 and 1995) and Scotland (2014), the strong rejection by the Spanish government makes it unlikely at the moment. Beyond the international recognition of a referendum on self-determination in Catalonia and the discussion of the legal framework (see Caspersen, Qvortrup and Turp on these topics, in this report), my focus here is on the drivers or main reasons explaining the citizens' increasing preference for a referendum on self-determination and the possible outcome of the consultation announced for October 1.

This paper is structured as follows: First, the role of the territorial dimension and the Catalan actors during the transition to democracy is briefly presented. Second, the evolution of political parties (positions, alliances and electoral support) is analyzed. This is followed by a section focused on the end of the accommodation strategy. Then, the social support for independence and the right to decide in a referendum is analyzed through data from different surveys and connected with main political events. Section five focuses on the most recent events. Finally, conclusions are drawn.

## **2. The Spanish Transition to Democracy and the New Territorial Arrangement**

Spain is considered to be a classic case of rapid transition to and consolidation of democracy. The death of General Francisco Franco on November 22, 1975, (who had been in power since 1939, after the long civil war initiated in 1936 ended) brought his successors into contact with a Europe that no longer found dictatorship acceptable. In such a scenario, the Spanish case is sometimes described as a case of regime-initiated transition that occurred under pressure from society (Linz and Stepan 1996). After Franco's death, Juan Carlos de Borbón became head of state and played a key role by driving forward change while simultaneously representing continuity with the Francoist institutions. Adolfo Suárez, head of government in the post-Franco transition (after the removal of Rodríguez Arias) convinced the Cortes to pass the *Law for Political Reform*, which envisaged its own dissolution and the creation of a new bicameral legislature. The law, which also convened the first free elections and opened the door to the legalization of all political parties, was approved with 425 votes in favour and 59 against. It was put to a referendum on December 15, 1976, in the first free vote for decades.

In Catalonia, the campaign in the mass media was organized in Catalan, forbidden under the dictatorship, under the slogan "In the big decisions, one has to be present. If you vote today, tomorrow you can decide" ("En les grans decisions, cal ser-hi presents. Si votes avui, demà podràs decidir"). The final result was 94 percent in favour of the reform with a turnout of 77 percent; in Catalonia, 97 percent in favour with a turnout of 74 percent (Spain Interior Ministry). After the referendum, the process of dismantling authoritarian structures accelerated.

<sup>1</sup> Catalan nationalism has a long history with different readings, which have been extensively studied. See, for instance, Fontana 2014, Miley 2006, Balcells 1991, Serrano 2013.

In April 1977 the Communist Party was legalized, and in June the same year the first open and competitive elections were held for a parliament that also served as a constituent assembly. After the elections power was distributed among various forces, including Suárez's centre-right Union of the Democratic Centre (47.4 percent of seats), the right-wing Popular Alliance (4.6 percent); the left-leaning Spanish Socialist Workers' Party (33.7 percent) and the Communist Party of Spain (5.4 percent). Regionalist parties were represented by Democratic Pact for Catalonia (3.1 percent), and the Basque Nationalist Party (2.3 percent) ([Spain Interior Ministry](#)). The political parties with parliamentary representation acted as channels of information between the discussions held at Moncloa and civil society, and this set the scene for the constitution-making process. The institutional framework chosen allowed for the representation of all key actors and an inclusive balance of forces, but at the same time it largely relegated civil society to the status of observers in a process that was led and steered by parties, parties backed by high levels of legitimacy (Welp 2013).

During the constitution-making process, both parliamentary deputies and the Spanish government were involved in long conversations in private and in public about defining the future political institutions. The territorial-administrative arrangement of the country and the recognition of the historic nationalisms were among the most controversial topics, given, on the one hand, the actors who had at various times demanded self-determination for their territories and, on the other, the radical position of the centralist parties. Catalan and Basque nationalisms, in particular, sought to create a new decentralized territorial organization, but the violence of the armed Basque organization ETA (Euskadi and Freedom) strengthened opposition from the military, who equated regional nationalism with terrorism. Notice that in the period previous to constitution making, several members of the armed forces were killed by ETA, including the successor selected by Franco, Carrero Blanco (Linz and Stepan 1996). For some people, the territorial conflict had the potential to escalate into civil war. For both historical reasons and contextual ones (the presence of ETA), the issue deeply divided the different groups, so it is especially remarkable that consensus was reached on the creation of a new decentralized power structure, based on 17 regions, and on the unprecedented transfer of power to the peripheral nations.

The Spanish Constitution was submitted to a referendum on December 6, 1978, when it was approved by 91.8 percent of those casting a valid ballot on a turnout of 67.1 percent. It was also approved in those territories in which peripheral nationalism was strong. In Catalonia, 95.1 percent approved the constitution on a turnout of 67.9 percent, while in the Basque Country it was approved by 74.6 percent, although on a much lower turnout (44.7 percent) (Spain Boletín Oficial del Estado 1978).

Once the Constitution entered into force, the *Statute of Autonomy for Catalonia (Estatut d'autonomia)* was discussed, written and submitted to a referendum. Of all the parties with parliamentary representation in Catalonia, only one was against, New Force (*Fuerza Nueva*), an extreme-right party that was against autonomy in general, arguing that it would destroy the unity of Spain. The Statute was supported by all other parties under the argument that autonomy would resolve the problems that centralism had not resolved. In the referendum, the Statute was supported by 88.1 percent of voters with a turnout of 59.3 percent (Ollero Butler 1979-1980). This result meant the approval for the creation of the Catalan Parliament and the executive government, the Generalitat de Catalunya. In 1980 the first

<sup>2</sup> Despite the fact that, during the transition process, the referendum was chosen as a mechanism to give popular legitimation to elite decisions, the Spanish constitution forbids citizens from initiating direct-democracy mechanisms at the national level as is possible in Switzerland and Italy or at regional levels in the United States and Germany. This is undoubtedly linked to the historical lack of political response to sovereignty conflicts. Nonetheless, under the previous 1931 constitution, citizens had the right to submit laws passed by parliament to a referendum if backed by 15 percent of the electorate. It also foresaw the need for referendums to validate autonomy issues.

elections of the Catalan Parliament took place.

### **3. The Electoral Arena**

According to Keating (1994), there are three explanations of the emergence of nationalism. The first is mainly based on an ethnic dimension, which has a stronger presence in past times and a lesser presence in consolidated democracies. The second is based on the will of the people. The third explains the emergence of nationalism as an instrument of a political elite seeking to create or reinforce a state through a nationalistic appeal. As Keating himself stresses, there are different factors and combinations of conditions, and quite commonly mixed situations are found when analyzing a given case. These are evident in Catalonia. Even if there is a long history behind the construction of a Catalan nationalism, its foundations are not ethnic, but were strongly developed during the early stages of the industrialization and modernization of Catalonia, and the role of political elites has been key. Strategic or genuine (see Carpensen's argument in this report), Catalan nationalism is inclusive in ethnic terms and does not support any primacy of race. However, the defense, protection and promotion of the Catalan language has been one of its main drivers, developed as a reaction against the Franco period, when the Catalan language was forbidden, and other aspects of life restricted (Skerret 2007).

Jordi Pujol, founder in 1974 of the political party Democratic Convergence of Catalonia (Convergència Democràtica de Catalunya, CDC), which was legalized in 1977, came to power in 1980 in the first free Catalan election held after the transition. He was elected by a coalition of his party and the Democratic Union of Catalonia (Unió Democràtica per Catalunya), giving place to the long-standing coalition Convergence and Union (Convergència i Unió, CiU), which would be broken in June 2015 after 37 consecutive years running together by the pro-independence turn of the first and resistance to it by the second. The end of the coalition also meant the end of a period in which both parties defended a federal model for Spain (i.e., neither independence nor the issue of holding a referendum was part of their program). Between 1980 and 2003 CiU was the main political actor in Catalonia. But things had started to change in 1999 (see Graph 1). In that year CiU won the election in seats but not in votes, and, without a majority, the party needed an agreement to form government. This came with the Majestic Pact, the agreement between the Catalan party and the centre-right wing Spanish Popular Party (PP).

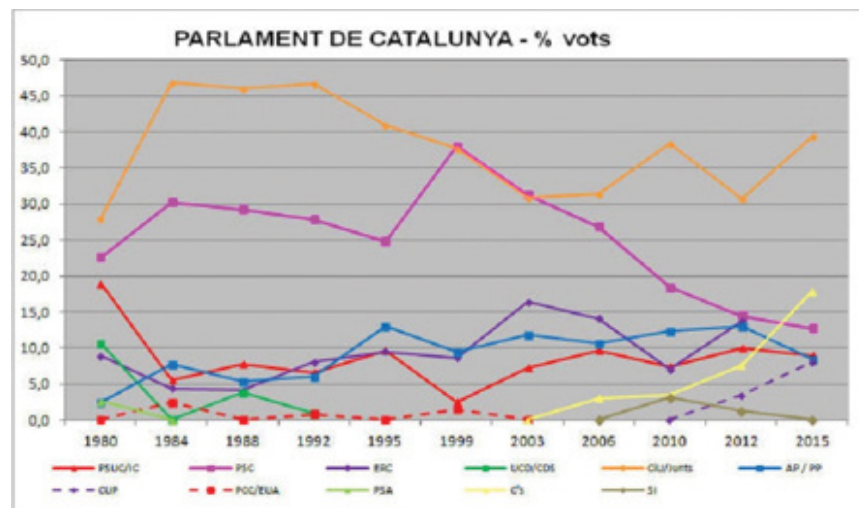
In 2003 the parliamentary elections in Catalonia made room for a new leftist alliance, the "Tripartit," among the Catalan Socialist Party, the Republican Left of Catalonia and Initiative for Catalonia Greens–United and Alternative Left (the PSC, the ERC and ICV-EUiA). The new president of the Generalitat, Pasqual Maragall, led the elaboration of a New Statute to replace the one approved in 1979. By then, the political-party system expressed more transformations: UCD disappeared and a new party was created, Ciutadans, a pro-Spain Catalan party, which, later on, in 2015, would have a role in the national elections.

More or less in parallel with the arrival of the Tripartit in the Catalan government, the former Basque president Juan José Ibarretxe (1999-2009) presented a controversial plan to transform the Basque region into a state "freely associated" with Spain. The Ibarretxe Plan, as it was known, would be achieved via peaceful and democratic means, including a referendum. But on November 28 of the same year, the Spanish government, led by the Popular Party's José María Aznar (1996-2004), reacted, initiating a characteristically PP style of response to nationalist claims: by appealing to the Justice to ban any attempt of popular consultation. Accordingly, the Penal Code was modified to

include an article punishing anyone who organizes elections or referendums without the parliament's authorization with prison sentences or disqualification from public office (*El País*, December 11, 2003). The Basque parliament approved the Ibarretxe Plan, which then passed to Madrid, where it was presented, but blocked at the national parliament level and not allowed discussion.

### Graph 1: Political parties and electoral results (1980-2015)

Source: <http://www.historiaelectoral.com/heauto2.html>



Shortly after, the general elections of 2004 changed the distribution of power, giving the Spanish government (in a minority) to the PSOE. Led by José Luis Rodríguez Zapatero (2004-2011), the period paved the way to a less confrontational climate. Then, in Catalonia the Tripartit—whose biggest party, the PSC, is a Catalan branch of the PSOE—announced the plan of elaborating a new Statute that was theoretically supported by President Zapatero (*El País*, November 14, 2003). Zapatero probably miscalculated when he expressed strong support for the Statute at a campaign meeting in Barcelona in November 2003, given that it was out of his control to give such guarantees, as the future legal controversies would prove.

On September 30, 2005, the Catalan Parliament approved the New Statute with 120 votes (all the parties represented—CiU, the PSC, the ERC and ICV-EUiA—excepting the Popular Party, 11 votes). The text was submitted to the Spanish Parliament, where the deputies introduced several changes. It was also submitted to the Constitutional Tribunal. This led to a new round of negotiations ending in a revisited proposal of the Statute agreed upon by CiU and the PSOE, and which passed with the votes of the PSOE, CiU, the PNV, IU, BNG and CC; it was rejected by the PP, ERC

(despite the party having been one of the Statute's main promoters, it did not accept the changes made in Madrid) and EA with the abstention of Chunta Aragonesista and Nafarroa Bai.

Once approved in Madrid, the Statute had to be ratified by the Catalan Parliament, which it was, although with less support than the original version, given that this time not only the PP but also ERC voted against it (making a total of 28 percent of the parliament against). Finally, the text was submitted to referendum on June 18, 2006. With a low turnout (48.9 percent), the Yes option received 73 percent of the votes and the No, 20 percent. ERC campaigned against.

On June 28, 2010, the Constitutional Tribunal ruled against the Statute, cutting most of its crucial articles. The sentence supported the claim of the PP and other six recusals presented by the governments of the autonomous communities of Aragón, Baleares, Comunidad Valenciana, La Rioja and Murcia, all controlled by the Popular Party. These sentences had strong effects. On July 10 the Catalan civil-society organization, Xarxa Òmnium organized a demonstration under the slogan "We are a nation, we decide" (Som una nació, nosaltres decidim), which received the support of labour unions, civil-society organizations, several political parties and the participation of an estimated half a million to one and a half million people, according to different sources (BBC News, July 10, 2010). The president of the Generalitat, José Montilla (PSC), had to leave the street (Carrer de Casp) under protection, given the rejection by the demonstrators (RTVE, July 10, 2010). The growing social discontent was even more evident when the Tripartit could not be replicated anymore.

In November 2010 CiU returned to power. The economic crisis was showing the first effects then, and the new Catalan government initiated a process of cutting social expenditures. In a scenario of polarization, the Popular Party won the general elections in November 2011 with an absolute majority. President of the Generalitat, Artur Mas, went to Madrid to negotiate a new fiscal agreement. He came back with a rejection and the decision to promote a referendum. At this time the launching of a grassroots social movement to support independence was also on the move with the first wave of informal referendums (*La Vanguardia*, September 25, 2012).

In November 2012 new elections were called but, contrary to what Mas expected, CiU lost support at the hands of the left-wing, strongly pro-independence party Esquerra Republicana de Catalunya. ERC had been a central actor in the Tripartit and became a key actor again. The party decided to enter in government on the condition of holding of a referendum on self-determination. On September 27, 2012, the Catalan Parliament approved a motion to call a referendum, and on December 19 of that year CiU and ERC signed an agreement called "Pact for Freedom" (Pacte per la Libertat), which created the foundation for the next steps (the departure of the Unión from the 37-year coalition and the agreement resulting in Together for Yes).

#### **4. The End of the Accommodation Strategy**

The previous section summarizes the complexity and flexibility of the agreements among parties (excepting the PP and later on Cs, owing to the same Unionist position). If from the transition to the early 2000s the main political preference was the accommodation within the framework of the autonomous communities, in the period between 2003 and 2006 an attempt to extend this agreement dominates the scenario. Since 2010 changes in preferences are reflected in both general and Catalan elections—programmatic changes developed by parties as well as by civil-so-

**Table 1. Elections of representatives, 1999-2016**

DATE	TYPE	WINNER	MAIN ISSUES	TURNOUT
17/10/1999	Catalan	CiU (in agreement with the PP)	Majestic Pact (PP-CiU)	59.2%
12/04/2000	General	PP (absolute majority)	Ibarretxe Plan (Basque Country)	68.7%
16/11/2003	Catalan	Tripartit (PSC, ERC, ICV-EUiA)	Proposal of a new Statute	62%
14/04/2004	General	PSOE (minority government)	Support for the Statute	75.6%
01/11/2006	Catalan	Tripartit (PSC, ERC and ICV-EUiA)	New Statute approved on October 30, 2005	56.7%
09/04/2008	General	PSOE (minority government)	The TC rules against several articles. Economic and political crisis	73.8%
28/11/2010	Catalan	CiU	Wave of informal referendums	58.7%
20/11/2011	General	PP (absolute majority)	Wave of informal referendums	68.9%
25/11/2012	Catalan	CiU and ERC form government. The condition for ERC is the call of a referendum.	A referendum is announced for November 9, 2014. Nonbinding informal consultation process.	67.8%
27/09/2015	Catalan	"Junts pel Si" (Convergència-ERC)	After the "plebiscitarian" election, the new government starts a unilateral process towards declaring independence.	77.5%
20/11/2015	General	No government for a year		69.7%
26/06/2016	General	PP (minority government)	National Pact pro referendum (December 23, 2016) Referendum announced for October 1, 2017	66.5%

Source: Author's synopsis



ciety demonstrations. Table 1 shows how these dynamics interact.

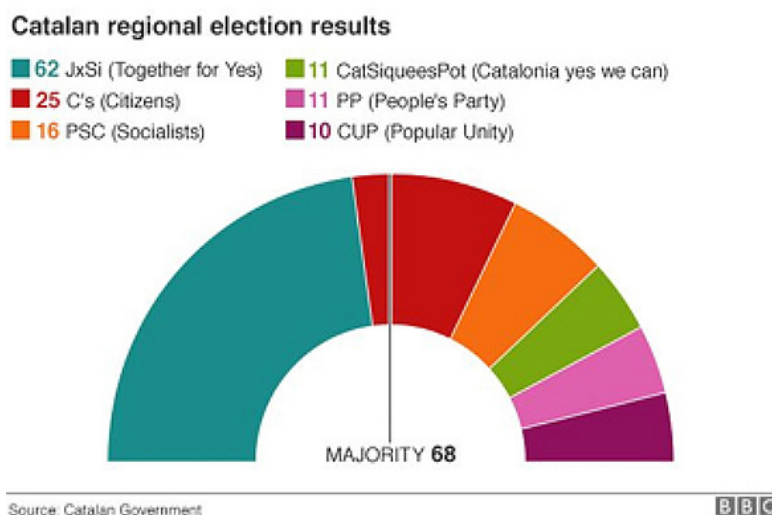
By 2006 the new Statute promoted by the Tripartit (the PSC, ERC and <sup>ICV-EUIA</sup>) was passed by the Spanish Parliament with the agreement of CiU and the PSOE. ERC promoted it within the government of the Tripartit and campaigned against it in 2006 after the amendment backed by CiU. At this time, political parties emphasized the necessity of fully developing the potentialities of the new Statute, including ERC, which had eventually opposed its final version and campaigned for a No in the referendum. It is noteworthy that for the 2006 elections CiU did not even mention the “right to decide” in its electoral program, yet instead emphasized policy issues that could be developed under the new Statute (Serrano 2015). The accommodation strategy was still hegemonic in the political arena. Interestingly, Keating and Bray (2006) have suggested that the failure of the Basque effort to formulate a third way between separatism and unionism in 2004 would have the ironic effect of reaffirming that actor’s language of traditional sovereignty. Something similar could apply to the understanding of the Catalan case, when all the doors to negotiate a new agreement were closed, while the distance between the political preferences in Spain and the political preferences in Catalonia were also growing.

Since 2010, the party formerly known as Convergència has been the party doing the most radical (electorally driven?) work. Unió has almost disappeared while Convergència has changed its name to Catalan European Democratic Party (Partit Demòcrata Europeu Català, PDeCAT), moving from supporting federalism to strongly supporting independence. In this regard, ERC already made an explicit reference to the possibility of a unilateral declaration of independence if the party obtained a sufficient majority in the parliament (ERC, 2010, p. 9 and p. 154, quoted by Serrano 2014).

Since 2012 the idea of holding a referendum has had a central place in Catalonia, with some parties in favour (within this group there is also a division between the unilateral or negotiated options) and some parties against. The first attempt at holding a referendum was legally blocked and ended in a non binding informal consultation on November 9, 2014 (for details, see the next section). The following year, the general elections were announced as plebiscitary for the pro-independence forces ERC and the then-named Convergència, under the pact “Junts pel Si.” However, they did not reach the expected results, falling short of an absolute majority. Then, the 10 seats achieved by the grassroots radical left party Popular Unity (Candidatura d’Unitat Popular, CUP) became crucial

Former president Mas expected to lead the coalition, but CUP rejected supporting a leader linked to the corruption scandals faced by Jordi Pujol’s family and CiU (*The Independent*, July 29, 2014; *Vilaweb*, March 1, 2017). After hard negotiations, in which agreement seemed impossible, Mas had to step down and Carles Puigdemont was elected president. Then, the process of disconnection was scheduled to be developed over 18 months, creating the structures of a new state, a new constitution, a new fiscal system and so on. Most of the plan has not been fulfilled, but the idea of holding a referendum has gained momentum since then, parallel to the rejection of the Spanish government and of the parties on the non-nationalistic side of the spectrum in Catalonia (the PPC, the PSC, Cs) and in Spain (the PP, the PSOE, etc.). The judicial contention has also increased to the level that many representatives from Catalonia who were engaged in the process of consultation made in November 2014 are facing the possibility of disqualification from public office and jail penalties.

**Graph 2: Election results 2015**



### **5. The Social Support for Independence and/or a Referendum**

This section focuses on the evolution of civil society's preferences regarding the territorial status of Catalonia. To this end, several surveys are analyzed. Even if there are some differences between them, it is possible to identify a trend. It can be fairly suggested that citizens' discontent grew with the failed experience of the new Statute and this increased the electoral support for the pro-independence parties. This had a side effect of polarizing positions (the PSC turned against independence while *Convergència* made the opposite movement). It is interesting that the right-wing pro-Spain parties (the PP and Cs together) never gained the support of more than a third of the electorate (see Graph 1).

An earlier opinion poll launched by the Spanish Center for Sociological Research (Centro de Investigaciones Sociológicas, CIS) in 1996 found that 33 percent of Catalans supported independence while 53 percent were against it (CIS nº 2228). Surveys tend to agree in locating this high, which is still clearly far away from majority support for independence, approached in 2003 (e.g., in 2000 a survey conducted by ICPS located the support for independence at 32 percent, while in 2001 CIS found a slight increase, locating the support for independence at 35.9 percent) (see Belzunces 2008). In 2003 ICPS shows a new increase, with the support for independence arriving at 43 per cent. However, the trend observed by the same source is not constant, oscillating around 30 percent during the period from 2004 to 2009. In 2010 the support clearly went up, explained by the dissatisfaction produced by the outcome of the Constitutional Tribunal, the waves of informal referendums (which are an answer to the TC, but also play a role in disseminate the claim), the effects of the economical crisis (increasing the feeling in favour of an independent state within Europe) and the reinforcement of the pro-independence parties. In June 2010, *El Periódico* identified a 47 percent support for independence (*El Periódico*, June 19, 2010).

The main events backing the growing social preference for independence in Catalonia had a starting point shortly after the referendum to ratify the new statute (June 18, 2006). The legal judicial controversies that started after the ratification led to the first wave of informal referendums. The first one took place on September 13, 2009. Between September and December 2009, 167 municipalities organized informal consultations. A second wave of informal

<sup>3</sup> As an example, on March 13, 2017, the Constitutional Tribunal condemned the former president of the Generalitat to two years of disqualification from public office.

referendums was organized in at least 80 municipalities on February 28 and a third one in 211 municipalities on April 24, 2010. On June 20, 48 municipalities joined the group. On July 10, 2010, a massive demonstration against the resolution of the Constitutional Tribunal was organized. On October 6, informal referendums took place in L'Ametlla de Mar, Tarragona, Rubí, Gavà and the United States. On April 10, 2011, an informal referendum was organized in the city of Barcelona (*Guardian*, April 10, 2011).

The previous wave of popular demonstrations resulting in unofficial but officially backed referendums (i.e., supported and organized by civil-society organizations backed by local governments) led to the strengthening of two main activist civil-society organizations, the Catalan National Assembly (ANC, created in March 2012) and Òmnium Cultural. The aim of the ANC is to reach independence through democratic and peaceful means. It is made up of over 500 regional groups comprising thousands of volunteers and has played a key role in organizing the informal referendums.

Another important event showing the power of the pro-independence/pro-referendum movement is the *Diada*. Since 1986, each year the National Day of Catalonia is celebrated on September 11—an event known as “*Diada*.” It remembers the fall of Barcelona during the Spanish War of Succession when the Catalan troops supported the Hapsburg dynasty until they were defeated by the army of the Bourbon King Philip V of Spain in 1714. In recent years it has become a big event supporting the claim for independence and/or a referendum on self-determination. This happened in 2012, when the *Diada* became a massive demonstration in favour of independence.

**Graph 3:**



Graph 3, with data from the Catalan Centre d'Estudis d'Opinió (CEO), shows that until 2010 the support for an independent state was always below 20 percent, while support for a new model of a state within Spain was greater, and support for the existent model (autonomous communities) was even bigger. After 2012 the picture changed radically, with a peak in 2014 (see Graph 3). In 2012 and 2013 many sources reported support for independence at over 50

percent. Although a comparison of sources reveals differences, the support for independence increased during this period, arriving at the maximum registered by surveys: e.g., 53.6 percent (*El Periódico*, October 2012); 54.8 percent (*La Vanguardia*, September 2012); 57.8 percent (*El Periódico*, May 2013); 52.3 percent (*Cadena Ser*, September 2013). Since 2015 surveys have identified a decrease (around 44 percent of support for independence).

On June 26, 2013, the agreement on the “right to decide” (*Dret a decidir*) was signed in the Parliament of Catalonia, with the support of civil-society organizations, and with the ANC playing the key role. When the decision to hold a Catalan referendum was eventually suspended by the Constitutional Tribunal, local pro-independence forces teamed up to develop the “participatory process.” After over two million people took part in the November 9, 2014, symbolic vote, the president of the Generalitat Artur Mas declared the participatory process a “complete success” and announced he would push for a meeting with Rajoy to negotiate a legally binding referendum. But Rajoy called the vote an “undemocratic and useless exercise, which has no legal effect.” (*El diari*, November 9 2014). In this context, the 36 percent who participated in the symbolic vote felt their democratic rights to have been violated, while many Catalans who did not take part were frustrated with both the central government and the Catalan government, which used their resources on a project that didn’t give sufficient guarantees or space to opponents.

It is interesting that a survey published by *La Vanguardia* in January 2017 shows how the support for a referendum goes beyond the support for independence and reflects a value cutting across Catalan society. According to the poll, 76.6 percent of the population is in favour of a referendum while only 19 percent is against it. 59.1 percent of the sample defends a consultation agreed upon with the Spanish government while 37 percent would also support a unilateral process.

## **6. Economic Crisis, Corruption Scandals and International Support**

The Catalan preferences for or against independence are not only shaped by the relation with Spain and the territorial model. There are other conditions worth mentioning, particularly the economic crisis, the corruption scandals and the (future) role of Catalonia within the European Union in the event that a referendum succeeds. The economic crisis started in 2008 when Lehman Brothers, a global financial service, went bankrupt. This played a major role in the unfolding of the global financial crisis in the late-2000s, when global markets plummeted and systemic risk was uncorked. The crisis did not affect Spain immediately, but by mid-2010 unemployment was extensive. The governments in Catalonia and Spain reacted trying to reduce the deficit by cutting social spending. This prompted citizens’ dissatisfaction. In Catalonia as well as in Spain Corruption also has played a role. In Catalonia, in June 2009, a corruption scandal known as “the Palau Case” drew attention to the illegal funding practices of the Convergence Party. Together with the scandal of corruption affecting the Pujol family, the crisis of the party was evident (and for many it explains the turn towards independence, as a strategy to keep supporters).

Related to the crisis, the constitutional reform agreed on by the PP and the PSOE in September 2011, which would introduce a law of budgetary stability prioritizing debt over any other expenditure (and accordingly giving priority to the markets over the social crisis), generated a growing citizen dissatisfaction (*Guardian*, August 26, 2011). In particular, considering that the PP’s main argument for banning a Catalan referendum was that the Constitution does not allow for it, the quick amendment of the constitution in 2011 contributed to eroding Catalan confidence in the general government even more.

By 2011 the citizens' discontent was growing everywhere, along with political discontent. The movement known later as 15M or Indignados (the origin of the new political party Podemos) spread, with demonstrations across the whole country. In Catalonia, the Party would play a role offering a way to resolve the Catalan problem, supporting a referendum but defending the permanence of Catalonia in Spain. In Barcelona the left-wing coalition in the government has also played a role in reinforcing the association of a referendum and/or the right to decide with democratic values, even for the ones who support the permanence of Catalonia in Spain.

Beyond domestic politics and especially the process of approval of a new Statute explored in previous section, other factors affect the Catalan preferences regarding independence. According to Serrano, the possibility of independence raises the question of whether Catalonia would be a viable state and of what impact it may have on welfare and in economic terms (see a detailed discussion by Caspersen in this report). It is also related to contemporary European affairs, from the fiscal austerity promoted by the central institutions to the question of whether an independent Catalonia would remain as a member state of the European Union or would be considered as a candidate that would have to reapply to become a full member (Serrano 2014). While it seems that a state of the dimensions and structure of Catalonia could be easily integrated into the EU, the political (dis)agreements regarding its permanence or incorporation are matters of public discussion.

## 7. On the Way to October 1

But what can be expected if on October 1 the referendum takes places? One key issue refers to the organization of the vote. Qvortrup (in this report) has analyzed the challenges faced by the Catalan government in organizing a fair vote under such complicated conditions.

According to a new poll by CEO, 62.4 percent would vote Yes in the independence referendum set for October 1. With a projected turnout of 67.5 percent for the vote, the poll says that some 37.6 percent of those who intend to vote would vote against independence. Normally, independence referendums that are not sanctioned by the central government result in overwhelming support for independence. However, a surprising suggestion of the CEO survey refers to the No vote, which would play a role in legitimizing the referendum (CEO, July 2017).

It is interesting that the same survey suggests that a new election would not lead to a radical change in favour of the pro-independence parties. In the hypothetical case of a Catalan parliamentary election, the pro-independence coalition Together for Yes would win again, with 60 to 63 seats (currently 62), followed by opposition party Citizens, with 20 to 22 seats (currently 25). The third strongest party would be the PSC, which would win 17 to 20 seats (currently 16). Catalonia Yes We Can (CSQP) would also be one of the winners, with 15 to 17 seats (currently 11) and the Catalan People's Party (PPC) would get 11 to 13 seats (currently 11). The anticapitalist CUP party would lose support, dropping from 10 to between 6 and 8 seats (Vilaweb, July 21, 2017). This means that the unilateral option for independence would lose fuel while there would be more power in the hands of the CSQP, a coalition openly in favour of a referendum and the promotion of direct citizen participation, but internally divided along Yes/No support for independence (Guardian, September 24, 2015). The conditions for holding a referendum on a legal basis have not been fulfilled, but a new participatory process with a higher level of participation could open room for negotiations.

<sup>5</sup> On May 24, 2015, in the election for the mayor of the city of Barcelona, Ada Colau, from Barcelona en Comú, achieved a simple majority and won the government.

<sup>6</sup> However, after the terrorist attacks in Barcelona (August 18, 2017), the question remains open.

## 8. Conclusions

After the transition to democracy in 1978, the new political agreement based on the creation of the 17 autonomous communities seemed to work as a framework for a federal understanding of Spain. It was only later, and particularly after 2006, that the feeling in favour of independence increased. Since then, a combination of social feelings favourable to independence generated from the grassroots, massive but not clearly majoritarian, with a strong political leadership from the top gave place to an incredible tension. My argument in this paper defended the thesis that the Catalan support for independence and/or a referendum on self-determination—preferences for these two different options are not equally distributed—is explained by three main political tendencies:

(i) A legitimate claim for more self-government has been expressed since the early 2000s with the proposal of making a new Statute (*Estatut d'autonomia*), promoted by a new coalition (the so-called Tripartit government, formed by the PSC, the ERC and Initiative for Catalonia Greens–United and Alternative Left), which arrived in the Catalan Government (*Generalitat*) in 2003, ending the hegemony of Convergence and Union, in power since 1980.

(ii) A strong Catalan social reaction has formed against the limits imposed by the Constitutional Tribunal (*Tribunal Constitucional*, TC) on the Statute approved in 2006 by the Catalan Parliament, modified by the Spanish Parliament and ratified by referendum in Catalonia. The TC declared 14 articles unconstitutional and another 27 subject to interpretation (STC 28 June 31/2010). This process boosted both the social preference for a referendum on self-determination and the rejection of the Spanish government led by the Popular Party, always reluctant toward any process of negotiation.

(iii) A unilateral process of “disconnection” (*desconnexió*) has opened, which, despite the efforts made by the Catalan government, did not gain international support or recognition, has the majority in government (seats in parliament) but not in votes (the pro-independence alliance was backed by 47 percent of votes). During the short but intensive process (January 2016–early September 2017, when this work was being written), the unilateral activity, oriented toward building the structures of the new state, has redefined political preferences again, introducing an incredible level of polarization.

As far as the legitimacy of the process goes, it can be said that the “right to decide” is strongly supported by a majority of Catalans, however, when it comes to unilateral decisions, the figures change substantially. In other words, support for independence (i.e., mainly based on a nationalistic grounds) and demands for a referendum (i.e., although not exclusively, but mainly based on a democratic grounds) are not equally distributed among Catalan voters—nor is the attitude regarding a unilateral, internationally unrecognized process. The majoritarian Catalan support for the “right to decide” (translated into a request for a referendum) and the reduced support for the Popular Party in Catalonia, together with the new forces emergent in the country and particularly in the city of Barcelona, suggest that the Catalan problem won’t be resolved in October, but what happens then will pave the way either for a (negotiated) democratic solution or for the escalation of the conflict.



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# III. THE CATALAN INDEPENDENCE REFERENDUM: CONFLICTING CLAIMS AND INTERNATIONAL RESPONSES

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1. **Introduction**
2. **From Autonomy to Independence**
3. **Arguments and Counterarguments**
4. **Responses**
5. **Post-referendum Scenarios**

## **1. Introduction**

what will be the likely fallout from the Catalan referendum, if it indeed goes ahead? Should we expect independence to be declared within 48 hours in case of a Yes vote, as announced by the president of Catalonia, and what will be the likely international response to such a declaration? In order to answer these questions, we need to examine the arguments made on both sides, as well the divisions that we find both within Catalonia and among the Spanish political parties, and analyze the international responses to date. Lessons can moreover be drawn from other self-determination conflicts: have they made similar claims and how have they been received internationally?

This paper first analyses the evolution of the demands made by the Catalan nationalist parties: what spurred the change from autonomy to independence, and how does this compare with other self-determination movements? The paper then examines the arguments made for and against the referendum and for and against Catalan independence. This section will again draw on comparative evidence: how do these arguments compare with the ones we find in other self-determination conflicts? The international responses will be then analyzed. Finally, the likely outcomes of the referendum will be discussed: what are the likely implications of a No vote and what can we expect to happen if the outcome is a Yes?

The paper argues that the lack of central-government acceptance of the referendum is likely to prove crucial; it has affected the dynamics on both sides of the debate and makes it unlikely that a declaration of independence will gain widespread international recognition. However, recognition is ultimately a political decision, and the turnout in the referendum and the reactions of the Spanish Government could be potentially important factors.

## **2. From Autonomy to Independence**

An independence referendum does not come out of the blue; it is preceded by a period of, usually gradual, radicalization of demands and increasing of tensions. For many years, Catalan nationalists aimed to increase Catalan autonomy within the existing constitutional framework (see Elias 2015, 85; Gillespie 2015, 11). Catalan voters

overwhelmingly supported the new Spanish Constitution in the 1978 referendum and the regionalization of Spain appeared to be consolidating in the 1980s (Gillespie 2015, 9). However from the mid-1990s, Catalan demands for a new kind of political and financial relationship emerged (Elias 2015, 92-93), culminating in widespread demands for independence. Following the 2015 regional elections, which were won by the pro-independence Together for Yes coalition, the Catalan regional parliament passed a resolution that proclaimed “the initiation of the process to create an independent Catalan state” and established that the Catalan government should obey legislation enacted only by the Catalan Parliament. The resolution explicitly stated that the Spanish Constitutional Court was no longer competent to pass judgment on the validity of Catalan laws (Comella 2015). This therefore marked a significant step towards the proclamation of independence and a binding referendum was announced for October 1, 2017. The draft referendum law mandates that if Yes wins, the Catalan parliament will declare independence from Spain within 48 hours of the vote (Torres 2017a).

What explains this fairly rapid evolution of demands? Two factors will be discussed below: (1) the relationship with the Spanish government, including the effects of the autonomy arrangement, and (2) intra-Catalan developments. These dynamics are fairly typical for self-determination movements and affect the types of demands made by the two sides in the conflict, as well as the likely international responses.

### *Relationship with the Centre*

The actions, or inactions, of the Spanish Government constitute the factor most often mentioned by the Catalan Government as the reason for the independence referendum, and also the one that has received most attention in the media and the academic literature. Gillespie (2015, 12, 15) argues that increased support for Catalan independence has mostly been driven by political and economic grievances, as well as a widespread perception among Catalan nationalists of a resurgent Spanish nationalism. Guibernau (2013, 380) similarly points to the Aznar Government’s (2000-2004) lack of response to demands for greater autonomy for Catalonia “at a time when secession was not even mentioned.”

In 2003, the hitherto dominant force in Catalan politics, Convergence and Union (Convergència i Unió, CiU) lost power to a coalition that promised a new enhanced autonomy statute (Gillespie 2015, 11). Elias (2015, 89) argues that there was growing frustration in Catalan society with the existing autonomy arrangement, which was found “increasingly wanting in the face of new policy challenges,” including immigration, slow economic growth and declining public services.

The new autonomy statute was watered down to ensure the necessary support of both two-thirds of the Catalan parliament and the Spanish parliament (Gillespie 2015, 12). Yet it still went too far for the main Spanish opposition party, Partido Popular, which took legal proceedings, challenging over half of the statute’s text (Guibernau 2013, 381). Four years later, the Constitutional Court found several provisions unconstitutional; 14 were suspended and a further 30 were modified (Guibernau 2013, 384). This decision is described as a key turning point. It was interpreted by many as a direct attack on Catalan sovereignty and Artur Mas, the CiU leader, argues that this was the moment when he shifted from supporting Catalan autonomy within Spain to supporting Catalan secession (Elias 2015, 93).

Divisions were deepened further by the rejection of a new financing model in 2012 (Gillespie 2015, 13). The CiU

framed the 2008 economic crisis, which had hit Catalonia hard (Guibernau 2013, 385), in explicitly territorial terms (Elias 2015, 94), but the Spanish Government used the crisis to introduce recentralization measures (Muro 2015). Gillespie argues that the crisis gave the ruling Partido Popular a rare opportunity to alter the centre-periphery configuration of power (2015, 17).

The reduction of autonomous powers, or the perception thereof, led to significant bottom-up pressures. In 2009, civil society organised a series of “non-binding symbolic referendums” (Guibernau 2013, 384). The constitutional court ruling further fuelled this popular mobilization; it was met with mass demonstrations, organized by civil-society organizations (Gillespie 2015, 8), and polls pointed to a dramatic rise in popular support for independence (Elias 2015, 93). In 2012, the discourse of CiU shifted decisively when it began prioritizing calls for an independence referendum (Gillespie 2015, 7). On January 23, 2013, the Catalan parliament approved a declaration that recognized the sovereignty of the Catalan people and asserted the nation’s right to decide on the nature of Catalonia’s relationship with the rest of Spain. This paved the way for an “unofficial consultative referendum” in 2014 (Elias 2015, 83).

Catalan politicians can therefore argue that they responded to the expressed will of the people and to their dissatisfaction with the actions of the Spanish state. However, internal political calculations also appear to have played a role.

#### *Intra-Catalan Factors*

Gillespie argues that positions on autonomy and independence have been used tactically in the electoral competition, especially between CiU and the Republican Left of Catalonia (Esquerra Republicana de Catalunya, ERC), and describes this as a “competitive process of mutual outbidding” (Gillespie 2015, 8, 10). Elias similarly contends that CiU changed strategy after it lost power in 2003; it abandoned its goal of seeking to maximize Catalan self-government within the constitutional framework, and instead made several proposals that implied a revision of the Spanish Constitution (Elias 2015, 89). However, CiU was constrained by internal divisions, and Elias argues that its pro-independence stance may have lacked credibility in the eyes of the voters, due to the party’s history of supporting autonomy (Elias 2015, 98). The issue of independence finally led CiU to dissolve into its component parts, and the larger Democratic Convergence of Catalonia (Convergència Democràtica de Catalunya, CDC) created the Together for Yes alliance, and in 2016 changed its name to the Catalan European Democratic Party (Partit Demòcrata Europeu Català, PDeCAT). While the ERC is part of the Together for Yes alliance, it is not part of the PDeCAT and both parties state that they would not be natural alliance partners in an independent Catalonia.

The academic literature generally holds that such internal divisions and competition lead to a radicalization of politics; leaders will be constrained by their rivals who would take advantage of any wavering on the issue of independence (see, e.g., Mitchell 1995). However, it could also suggest that the demand for independence may not be as absolute as it seems—that there may be some room for pragmatism should the political calculations change. In any case, such political calculations are likely to affect the specific formulation of the demand for a referendum, and for independence. This is explored below.



### *Comparative Perspective*

Central governments do in some cases agree to the holding of independence referendums in their constituent regions. The British Government agreed to the Scottish independence referendum, while the Canadian Government implicitly consented to Quebec's referendum. Independence referendums have also been included in a few peace agreements, such as Sudan's 2005 Comprehensive Peace Agreement, which paved the way for South Sudan's independence. But central governments usually reject such demands and Catalonia is by no means the first autonomous region to hold an independence referendum without central-government acceptance. Other examples include Crimea (Ukraine), Kosovo (Yugoslavia) and Nagorno Karabakh (Azerbaijan). In fact, some scholars argue that autonomy is an important factor in the radicalization of demands—that it provides the means and the motives to pursue independence (see, e.g., Erk and Anderson 2009). Roeder contends that autonomy traps politics “between two perils—centralization and dissolution—with no stable equilibrium between these two extremes” (2009, 208). Proponents of autonomy may be willing to concede that autonomy has a “terrible track record” (Snyder 2000, 327), but they counter that the major failures, such as the Soviet Union and Yugoslavia, were largely “sham or pseudo-federations” (McGarry and O'Leary 2009, 9), which provide limited lessons for autonomy in consolidated democracies.

In any case, recentralization seems to be a more frequent trigger of instability in cases of territorial autonomy than secessionist attempts. For example, the abolishment of autonomy either triggered or significantly strengthened secessionist movements in cases such as Kosovo, Abkhazia and Nagorno Karabakh. Similarly, my analysis of post-Cold War peace agreements showed several examples of increasing tensions, and in some cases renewed violence, when either autonomy arrangements were not implemented or provisions were undermined at a later stage (Caspersen 2017). The Catalan case shows that a change in popular support for independence does not necessarily require the wholesale abolishment of autonomy, or even the unequivocal reduction of devolved powers. The perception that autonomy is being undermined, that autonomy no longer allows for internal self-determination, and the refusal to address such grievances may be enough to radicalize demands.

As will be shown below, the autonomy arrangement features heavily in the arguments made by both proponents and opponents of Catalan independence. When it comes to the legitimacy of the demands made by the opposing side of a conflict, one problem is that it is often difficult to determine whether autonomy is indeed being eroded or whether promises remain unfulfilled. This is especially the case if the autonomy arrangement is deliberately vague or flexible, such as in the case of the Spanish Constitution. This may however not matter much to the international response to the conflict. Autonomy is usually treated as a domestic matter, which has no bearing on the right to (external) self-determination.

Another factor the Catalan case has in common with other self-determination conflicts is the relative flexibility of the demands made. Self-determination claims are rarely static and we often see a movement between demands for autonomy, of varying degrees and forms, and independence. This is also evident in the Catalan case where the ERC has, for example, gone from a goal of independence to autonomy and back to independence (Elias 2015, 91). Moreover, the emphasis on the “right to decide” allows for greater flexibility than a determined campaign for independence. Self-determination movements often make use of a form of constructive ambiguity in order to increase their room for manoeuvre. For example, in the case of Abkhazia, independence was not declared until 1999, even though the territory had been de facto independent since 1993. The declaration of sovereignty that preceded it still left some room for a solution that maintained the existing state (Caspersen 2012). Once an unambiguous demand

for independence is made, it can, however, be difficult to backtrack, especially if the leaders are faced with the risk of outbidding from more committed rivals. What this means for the Catalan case will be explored below.

### **3. Arguments and Counterarguments**

Although the demand for an independence referendum in the Catalan case was in large part a response to popular pressure, the arguments made do not simply address a domestic audience. International support is crucial for separatist movements and this need significantly affects the claims made (Caspersen 2012). Moreover, the pro-independence arguments also have to reflect the demographic reality of Catalonia. The central government, on the other hand, will be more reluctant to internationalize the conflict, especially since it has not accepted the legitimacy or indeed legality of the referendum. This will shape the strategies adopted by the political forces opposed to independence and the arguments they are making.

#### *Pro-Independence Arguments*

The first argument made by the pro-referendum and pro-independence Catalan parties is focused on Catalonia as a historic nation. For example, when the president of Catalonia, Carles Puigdemont, announced the holding of the referendum, he referred to “the legitimate right to self-determination that a thousand-year-old nation like Catalonia has” (Catalan News Agency 2017). His predecessor, Artur Mas, similarly stressed that Catalonia is “one of the oldest nations of Europe” and has “one of the oldest parliaments in the world...its own culture, its own language, its own identity, its own civil law” (Catalonia Votes 2014a).

This is a classic claim to national self-determination. As Puigdemont argues, “Catalonia is a nation with the right to decide” (Al Jazeera 2017). In 2014, Mas similarly contended that Catalonia, “as all the nations in the world..., has a right to decide its political future” (TV3 2014). This claim is founded on the assertion of a historic right to statehood, based on Catalonia as one of the founding nations of Spain with a history of independence. As the website Catalonia Votes argues, “Catalonia has always had a distinct culture and language and a strong desire for self-government. Though Catalonia lost its independence in 1714, there was a political and cultural renaissance in the 19th century which eventually led to the proclamation of the Catalan Republic in 1931” (Catalonia Votes 2017b).

Unlike many self-determination claims, this is not an ethno-national claim. Mas presented Catalonia as “a sort of melting pot” and notes that “70% of our people have a non-Catalan origin” (Catalonia Votes 2014a). Puigdemont similarly argues that it is a “political conflict” and stresses that “Catalonia does not want an identity-driven state” (Al Jazeera 2017).

The demographic realities of Catalonia in part dictate such a strategy. The pro-independence parties know that they will not be able to secure a majority for independence if they appeal only to ethnic Catalans. This is similar to the Montenegrin case where the lack of an ethnic Montenegrin majority compelled the pro-independence forces to create a broader alliance for their independence referendum that included the country's non-Serb minorities (see, e.g., Deloy 2006). In the case of Catalonia, there is a similar attempt to reach out to the region's sizeable immigrant population and convince them of the benefits of independence (Saeed 2017a). Such a broad appeal requires an inclusive nonethnic definition of the nation which is to exercise its right to self-determination.

Another reason for the reluctance to make an ethnic claim is likely to be the need to attract international support. Ethno-nationalist claims are largely discredited and are unlikely to garner much international sympathy, and an overtly ethno-nationalist agenda would also sit uneasily with the leftist programme of some of the pro-independence parties. Gillespie argues that many “*soberanista* political actors insist that they are not nationalists due to fear of being associated with ethnic nationalism or the nationalism of the far right in Europe” (2015, 12).

The problem with such an inclusive claim to self-determination is that it makes it harder to define the nation: what constitutes this historic nation, if not ethnic origin? The fallback option in the Catalan case appears to be the Catalan language and, more amorphously, Catalan culture. However, the former can also be exclusive and has led to complaints of discrimination against Castilian speakers. For example, Blanco (2017) argues that Catalonia is “the only regional government in the world to deny the majority of its population the right to be educated in their mother tongue.” In other self-determination conflicts where the core ethnic group does not constitute a majority—such as Abkhazia and Transnistria—we have seen the difficulties that may be associated with a more inclusive claim to self-determination: the tensions it creates between the need for majority support for independence and the need for a cohesive narrative, and the particular difficulty of encompassing the community that constitutes a majority in the state as a whole (Caspersen 2012).

Integral to the Catalan claim to self-determination is a claim to democracy. National self-determination is about allowing the people to decide their political future, and the discourse of democracy features heavily in the pro-independence argument. Mas, for example, pointed to the popular demonstrations and argued that “a large majority of the Catalan people want to vote” (Catalonia Votes 2014a) and at his court appearance in 2015 he stated that “the people were pushing the Catalan institutions to...let people have their say, to let people vote” (Harris 2015). Jordi Turull concurs, “This is democratic, this is legal, this is peaceful” and asks “who is afraid of democracy in Europe in the twenty-first century?” (Catalonia Votes 2014b). Such arguments are to reinforce the legitimacy of the self-determination claim: it is not a top-down, elite-manufactured process, but an expression of popular will.

However, the claim to national self-determination does not stand alone. This is again similar to other cases: additional arguments are needed, given the strong international bias against secession outside of the context of decolonization (Caspersen 2015). The main argument here refers to the actions of the Spanish Government and the Constitutional Court decision. Puigdemont describes the ruling as “hugely offensive” and argues that at this point, “We said, enough is enough, they have no right” (Al Jazeera 2017). Turull strikes a similar note when he argues that “for some years now, the Spanish state breaks the agreement on the self-government of Catalonia” (Catalonia Votes 2014b). The Catalan Government’s website, Catalonia Votes also points to the constitutional court decision and the rejection of the proposal for greater fiscal autonomy and adds that “attacks against Catalonia’s education system and linguistic rights have also increased and more and more recentralisation measures are being taken” (Catalonia Votes 2017b). This does not constitute a claim to a remedial right to secession, which would normally require severe human rights violations to have been committed by the central state (Caspersen 2015), but it implies that self-determination cannot be realized within the existing state, thus presenting a case for external self-determination. As Puigdemont argues, Catalonia is “tired of the state not complying and of having to renounce Catalan to be Spanish” (Al Jazeera 2017).

Finally, the referendum is presented as a means to solving a conflict, as a necessary but pragmatic measure. Puigdemont argues that he called a referendum “because there is a conflict between Catalonia and Spain that can be

resolved only as Western democracies resolve their problems: voting, listening to the people” (Al Jazeera 2017). This final argument suggests some ambiguity as to the goals of the referendum, but such ambiguity has otherwise been reduced in the run-up to the referendum. Gillespie (2015, 13-14) argues that Catalan nationalists use “loose terms” such as *sovereignty*, which reflects a widespread ambivalence and political flexibility. This, he argues, allows them to appeal to voters with different constitutional preferences. The 2013 declaration from the Catalan parliament, for example, recognized the sovereignty of the Catalan people and its right to decide (Elias 2015, 83). Catalan sovereignty does not necessarily imply independence, but could be exercised within the existing state. However, the position appears to have become less ambivalent with the draft referendum law, which states that independence will be declared within 48 hours in case of a Yes vote (Torres 2017a). Such a position does not leave a lot of room for manoeuvre (see also Qvortrup in this report).

There is still the possibility that divisions within the pro-independence camp could create greater flexibility. Although the parties making up the current governing coalition all share the goal of independence, they do not otherwise have much in common. Moreover, Puigdemont has found divisions within the cabinet when it comes to the best way to further this goal. Thus, in early July, he sacked his business minister, Jordi Baiget, after he publicly expressed doubts over whether the referendum would take place as planned: “The [Spanish] state is so strong that we probably won’t be able to hold the referendum” (Hedgecoe 2017a). The Spanish Government has long hoped that such internal divisions would undermine the secessionist project, but this shake-up of the cabinet was interpreted as a point of no return (Torres 2017b).

That leaves the effect of the obstacles put in place by the Spanish Government. It has relied heavily on a legal strategy to stop the referendum from happening. As a result, the regional budget for the referendum has been taken down in the courts, the Catalan Government has so far been unable to buy ballot boxes, and some city halls have refused to let their facilities be used as polling stations. Moreover, the Catalan government does not have its own official voter register (Torres 2017b). Like the internal divisions, these obstacles may not lead Puigdemont to abandon the referendum, but it could affect what happens after the result. The possible implications of (limited) ambiguity, internal divisions and legal obstacles will be further explored below.

In conclusion, the arguments made by the pro-independence parties are classic national self-determination arguments. However, unlike most self-determination movements, they adopt a non-ethnic definition of the nation. This is not without tensions, but it allows for a broader appeal. The claim to a right to self-determination is combined with a more limited claim to a remedial right to secession, although this is based on the argument that self-determination cannot be fully exercised within the existing state rather than on any allegation of human-rights violations.

### *Arguments against Independence*

The arguments against the holding of the referendum and against Catalan independence are also similar to the arguments we find in other self-determination conflicts. It is argued that such a move violates the constitution, that Catalonia is not a self-determination unit, that such a referendum would be undemocratic and that the pro-independence parties have ulterior motives. However, the Spanish Government has primarily focused on the illegality of the referendum. For example, State Secretary Ayllón has stated that “there won’t be a referendum, because

the [Spanish] government won't allow it and because they don't have any capability to organize it" (Torres 2017b). Unlike its Catalan counterpart, the Spanish Government does not seek international attention, preferring to keep this a domestic matter. Moreover, the lack of government acceptance of the referendum has resulted in a lack of well-developed No campaign, since such a campaign would imply that the legality and legitimacy of the referendum are accepted. We therefore have to turn to Spanish scholars and others to find a more articulated and developed argument against independence.

The argument for national self-determination is rejected—for example, by Nacho Martin Blanco, who argues that Catalonia has never been “an independent political nation or a state in modern terms,” and that the Catalan people have enthusiastically supported the Spanish state. The Spanish Constitution, he argues, “is based on the indissoluble unity of the Spanish nation”; it was the result of a broad consensus and “received support from over 90 percent of the Catalan voters in a referendum” (Blanco 2017). He also argues that there is a lack of precedent for such self-determination: “There is no democratic state in the world that gives its constituent regions the right to self-determination. The indissoluble unity written into the Spanish constitution is also a part of the Italian, French, German and U.S. constitutions” (Blanco 2017).

This rejection of Catalonia as a unit of self-determination leads to a rejection of the democracy argument. As in other self-determination conflicts, it is argued that the legitimate demos is the entire population, not just the population of Catalonia, and the referendum is seen as disregarding the existing legal order, “an order that derives from a democratically enacted Spanish Constitution” (Comella 2015). Parts of the Spanish press followed this argument in their coverage of the draft referendum law, which was described by *El País* as a “fraudulent law,” which erodes democracy and essential freedoms, while *ABC* characterised it as a “a delirious law that tramples on the rights, guarantees and liberties of Catalans themselves,” and *La Razón* argued that it was a “blow to democracy” (all quoted in Saeed 2017b).

The anti-independence forces similarly reject the argument that Catalonia is denied internal self-determination. The leader of the Catalan opposition, Inés Arrimadas from the Ciudadanos party, for example, argues that Catalonia is “already one of the regions in Europe with the highest degree of self-government” (Hedgecoe 2017b; see also Blanco 2017).

Finally, the Catalan opposition have questioned the motives of the pro-independence parties. Alberto Fernandez Diaz, from the People's Party of Catalonia, for example, argued that they “hide a long tradition of corruption and ill-management of public money” (Press TV News 2017), while Arrimadas points to what she sees as their exclusionary policies: “It's nationalism, plain and simple. Nationalism also means saying ‘Only those who think like me or who speak my language are Catalans’—it's a totally segregationist project” (Hedgecoe 2017b).

However, the unionist side is divided—not so much over the arguments against independence as over the best response to the referendum. The leader of the PSOE, Pedro Sánchez, has pledged support for Prime Minister Mariano Rajoy in opposing the referendum, but the two appear divided over whether or not article 155 of the Constitution could be triggered. This never-used article could suspend, in part, Catalonia's autonomous powers. The government has been careful not to rule this out, as a last resort (Hedgecoe 2017c), but the Socialists are calling on Mr. Rajoy to engage more seriously in dialogue with Catalonia, instead of threatening legal action. The PSOE formally supports the concept of Spain as a “pluri-national” country and has warned that they will present legislative reforms if the government fails to resolve the conflict (Hedgecoe 2017a). The Unionists in Catalonia are even more divided and the campaign to keep Catalonia in Spain is “small and fractured.” There is no common position on whether to oppose

the referendum, or on whether Catalonia should be given more autonomy (Torres 2017c).

The arguments made by the political actors opposed to the referendum and to independence are very similar to what we find in other self-determination conflicts. However, divisions on the Unionist side concerning the best form of response could affect the aftermath of the referendum, if it does indeed go ahead. This will be discussed below. Moreover, it is important to note the difficulty in campaigning for a No vote in a referendum that is deemed illegal. The dynamics are different than in cases such as Scotland, where the referendum was accepted by the central government. This also affects international responses to the referendum and its likely aftermath.

#### **4. Responses**

The intended audiences for the arguments for and against the referendum, and for and against independence, are both domestic and international actors. The responses of domestic audiences can be assessed through opinion polls. These have tended to show declining support for independence as the referendum approaches: in June 2017, 41.1 percent of those polled supported Catalan independence, down from 44.3 percent in March (Cerulus 2017) and down from 57 percent in November 2012 (Guibernau 2013). This would point to a No vote, but turnout looks likely to be decisive. Thus, a more recent poll by the Catalan Centre for Opinion Statistics (CEO), which includes only those who actually intend to vote, finds that 62.4 percent will vote Yes (ACN 2017). Public opinion can shift drastically in the run-up to a referendum and turnout is hard to predict, which serves as a caution against any attempt to predict the outcome.

Independence referendums that are not sanctioned by the central government often result in overwhelming support for independence. In some cases, such as Crimea's 2014 referendum, this undoubtedly owed something to manipulation and intimidation. However, it also reflects a reluctance of voters opposed to independence to partake, since this would legitimize the referendum. It is therefore also important to look at the percentage of votes who support the referendum, regardless of their position on the issue of independence. This percentage has consistently been higher than the percentage of voters who support Catalan secession (*Telegraph* 2017), which suggests that at least some No voters will turn out, thereby making for a closer and less predictable result.

Polls covering Spain as a whole are a lot less equivocal: the opposition to Catalan independence is strong, suggesting that the PP and the PSOE are in tune with the majority of their voters: in 2012, only 9.4 percent of Spaniards backed the right of the autonomous regions to become independent states (Guibernau 2013).

The response of domestic audiences is clearly crucial for the outcome of the referendum, but the attitude of Catalan voters to independence is likely to be affected by international responses, by the likelihood of international support for an independent Catalan state. The position of the EU, in particular, has been a crucial issue in the debate, with the pro-independence parties arguing that Catalonia would remain a member, and the anti-independence parties denying this.

So far, the response from states and intergovernmental organisations has been disappointing for the Catalan government. The EU Commission has gone out of its way not to comment on the referendum (Heath 2017), and the attempt by Carles Puigdemont to involve the European Commission for Democracy Through Law (also known as the Venice Commission) was rejected: the Commission's President replied that both the referendum and any cooper-

<sup>1</sup> See scanned letter from Gianni Buquicchio, <http://www.venice.coe.int/files/Letter%20to%20the%20President%20of%20the%20Government%20of%20Catalonia.pdf>



ation with the Commission had to be carried out in agreement with the Spanish authorities and emphasized that the referendum has to be carried out in full compliance with the Spanish Constitution and the applicable legislation. This suggests that the issue is regarded as a domestic matter by the EU. Moreover, senior EU representatives have warned that secession “would imply at least temporary exclusion from the Union” (Gillespie 2015, 4). Responses from the US do not offer any support either. A 2012 petition to the White House to support the people of Catalonia in their effort to decide their own future elicited the following response: “We are confident that the Government and the people of Spain will resolve this issue in accordance with their laws and Constitution (Guibernau 2013, 373). It thereby stressed the importance of respecting the constitution and designated the whole population of Spain as the relevant demos.

This is not really surprising. The international bias against secession remains strong, and the creation of new states outside of the colonial context is always portrayed as the exception (see more below). Nevertheless, pro-independence politicians argue, or hope, that a strong vote in favour of independence will lead to more pragmatic responses, especially at the European and member-state levels (Gillespie 2015, 4). Puigdemont argues that “if there is a clear will and a clear message, recognition comes.” He notes that the European Union has not taken an official stance on whether an independent Catalonia would need to apply for membership and argues that Europe always reacts late: “It threatened pre-independence Slovenia that it would never recognise it and after a few months it recognised it and it is now a member state.” He further points out that “Catalonia has always been a region that contributes positively to the European Union” (Al Jazeera 2017).

On the website Catalonia Votes, a range of international notables, ranging from actors to heads of state, are listed as supporting the Catalan referendum and in some cases independence (Catalonia Votes 2017a). But, with a crucial distinction, all the state leaders quoted support the general right to national self-determination and do not argue that it applies to the Catalan case. The hope of the pro-independence parties is that, following a successful referendum, they can be persuaded to extend this principle to Catalonia. The pro-independence side has also taken note of debates held in some national parliaments, such as the one organized by the UK’s All-Party Parliamentary Group on Catalonia, which supports the vote (*Catalan News* 2017).

## 5. Post-referendum Scenarios

In case of a No vote, Puigdemont has declared that he will dissolve parliament and call parliamentary elections, “so that a new political majority can manage and apply that result with the utmost respect” (Al Jazeera 2017). A No could also be expected to weaken the pro-independence parties and the case for independence. If we look at Scotland, then we see that the Scottish National Party (SNP) has remained in power and has not abandoned the goal of independence. However, the SNP faced a setback in the 2017 general elections and there are signs that the Yes side is starting to splinter (Torrance 2017). But the Scottish experience may not be repeated in Catalonia, and the effects of a No on the pro-independence side likely depend on, firstly, how decisive the outcome is, and secondly, how the Spanish government responds—whether they choose to try to improve relations through dialogue or whether they rely on punitive measures. Moreover, there is a crucial difference between the two cases: the Scottish referendum was sanctioned by the Westminster government. This made it easier for Scotland to gain concessions and also meant that the pro-independence forces did not face the threat of legal sanctions.

Unilateral independence referendums are almost always won by the pro-independence side. One exception would be the 1980 and 1995 referendums in Quebec, but these were at least implicitly accepted by the Canadian Government, which affected the turnout of No voters. This data does not signify that a Yes vote is inevitable in the absence of central government acceptance, since such unilateral referendums have generally been held in non-democratic contexts, but we lack comparative evidence of No votes on which to draw. However, what would happen after a Yes vote in Catalonia is even more uncertain. The two main options would be: (1) that the referendum is used as a bargaining chip to negotiate a better autonomy arrangement and (2) that Catalonia is declared an independent state. Let me examine those two scenarios in turn.

A decision to use a Yes vote as leverage against the Spanish Government could reflect the lack of international support for the referendum and a realization that recognition will be very difficult to secure. Independence referendums have had this effect in a few other cases: Tatarstan (Russia) held an independence referendum in 1992 and Crimea (Ukraine) held one in 1994, and these referendums were in both cases used to negotiate wider autonomy from the central government. There are speculations that the independence referendum announced in Iraqi Kurdistan in September this year serves a similar purpose. The argument for Catalan independence has, as noted above, always been marked by some ambiguity, which could make such an outcome more likely.

There is some indication that the Catalan government, or parts thereof, would be willing to consider such an option. Puigdemont has stated that a “third way” proposal that “secures Catalan competencies, and addresses complaints like language, finances, infrastructure and education” would obtain widespread popular backing, but he argues that such a proposal has never been put on the table (Torres 2017b). Therefore, this outcome would depend on the Spanish Government being willing to offer significant concessions. So far, Rajoy has not been very conciliatory, and he may not be willing, in effect, to recognize the legitimacy of the referendum and propose an arrangement that is far-reaching enough to satisfy the pro-independence parties. Gillespie (2015, 7) also points out that it may be difficult for the Catalan nationalists to return to the politics of accommodation. Divisions within the pro-independence camp present the risk of outbidding, especially in case of strong support for independence in the referendum.

The second option is that Puigdemont follow the draft referendum law and declare Catalonia an independent state within 48 hours of a Yes vote. I would consider it unlikely that a declaration will be made so quickly. Even if preparations for independence are apparently underway, the Catalan government is likely to first sound out possible external backers, which could lead to some delay. Once a declaration of independence is made, the fallout crucially depends on the reaction of the Spanish Government: if it accepts Catalonia’s secession, then international recognition is likely to follow shortly, as in the cases of Montenegro and South Sudan. However, this is highly unlikely and we would therefore find ourselves in uncharted waters: a unilateral secession from a consolidated democracy.

The Spanish Government is initially likely to downplay the referendum result (Torres 2017b) and may react in a similar way to a declaration of independence, describing it as an act of protest, which is of no legal consequence. International actors may well take the same position and at first maintain that this is a purely domestic matter and urge the parties to reach a solution through dialogue.

International recognition is unlikely as long as the central government is opposed: previous cases of post-World War Two recognition outside of a colonial context have been deemed to be cases of state dissolution (USSR and Yugoslav republics) or so-called unique cases based on the presence of an international administration (Kosovo) or severe

human rights violations (Bangladesh) (see, e.g., Fabry 2010). However, recognition *is* a political act and some of these arguments are clearly open to (re)interpretation; for example, Russia's recognition and subsequent incorporation of Crimea was justified in part by the alleged threat of future human rights violations. As Coggins (2014) argues, great power politics and strategic interests have been decisive for the recognition of new states. Nevertheless, international recognitions are still legitimized, and justified by the right to national self-determination. Therefore, I would expect the arguments and the conduct of the opposing sides to be of importance, at least when it comes to widespread recognition.

This makes the conduct of the referendum of potential significance, and in this regard the Catalan government faces two important problems: (1) the lack of a voter register, and (2) a possible low turnout. These two factors make it easier for the Spanish Government to deny the legitimacy of the vote. The Catalan Government needs a high turnout, including by those who oppose independence, in order to make a stronger case for national self-determination. The reaction of the Spanish Government could also be significant. Although the use of force against a secessionist region is generally considered compatible with international law—and regimes that have used it have faced few repercussions—it is hard to reconcile with a consolidated democracy. For an international actor already poised to recognize an independent Catalonia, it could strengthen the argument for a remedial right to secession.

Nevertheless, nonrecognition remains the more likely outcome. Where would that leave Catalonia? The Catalonia Votes website quotes Joseph Stiglitz as saying, “In the current context of open markets, I’m sure things would work out for Catalonia as an independent country. Small countries find it easier to operate independently in the present globalisation environment” (Catalonia Votes 2017a). But this depends on recognition. Although globalization makes it easier for unrecognized entities to survive, nonrecognition comes at a cost (Caspersen 2015). The exact cost, however, varies significantly from case to case. Experience from other cases tells us that the extent of international links will depend on a number of factors, most notably: (1) the position of the Spanish government (how strongly will it resist “engagement without recognition?”); (2) the willingness of the Catalan government to tone down its claim to independent statehood; (3) the extent of external actors’ interests in Catalonia; and (4) the number of states that recognize Catalan independence (see, e.g., Caspersen 2015; Berg and Pegg 2016). Even as an unrecognized or only partially recognized state, Catalonia would not face complete isolation. In some cases, such as Kosovo, we have seen a great deal of international pragmatism and willingness to engage, even by states that do not recognize Kosovo’s independence. And Catalonia will undoubtedly be helped by the extensive links that already exist and which make it a case very different from most unrecognized entities. That said, nonrecognition will undoubtedly come at a cost and will create a political headache for international actors worried about setting a precedent and encouraging other would-be secessionists.

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# IV. A COMPARATIVE PERSPECTIVE ON REFERENDUMS ON INDEPENDENCE AND THE PROPOSED CATALAN REFERENDUM OF OCTOBER 1ST, 2017

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1. **Introduction**
2. **The History of Referendums on Independence**
3. **Balloting To Stop Bullets?**
4. **Special Majority Requirements**
5. **Who Is Allowed To Vote?**
6. **The Wording of Referendum Questions**
7. **The Administration of the Referendum**
8. **The Legality of Referendums**
9. **An Assessment of the Draft Law on the Self-Determination Referendum**
10. **Conclusion**

## **1. Introduction**

On October 1st, 2017, Catalonia is expected to hold a referendum on whether to become an independent state. This referendum is not exceptional. Since the fall of the Berlin Wall, numerous countries have held votes on independence. This paper analyzes the rules, norms and practices regarding the independence referendums in comparative perspective and contrasts these with the Law on the Self-Determination Referendum (Llei del referèndum d'autodeterminació vinculant sobre la independència de Catalunya, henceforth Llei del referèndum d'autodeterminació). Each the issues regarding the compatibility of said law with international norms will be analyzed in turn before a final conclusion is reached.

Before delving into the finer points of these referendums and how they contrast—or compare—with the proposed Catalan referendum, it is useful to look at the history of independence referendums.

## **2. The History of Referendums on Independence**

It is a little known fact that the first referendums on independence were held in the Confederate states in America in the early 1860s. At this stage, the referendum was already a deep-seated part of political life. The first referendum in America was held in 1788 in Massachusetts, when voters were consulted on whether they wanted to give up their independence and join the newly minted United States. By the mid-1850s, it had become commonplace to consult the citizens in major issues of constitutional importance. It was natural, therefore, that Texas, Virginia and Tennessee submitted the decision to secede from the Union to the voters in 1860. What is perhaps interesting is that the support for secession was not unanimous. In Tennessee, for example, 104 019 voted for secession while 47 238 voted against, and in Texas the figures were 34 794 for and 11 235 against. We do not have figures for Virginia. These were not endorsements of epic proportions—and perhaps this should have caused the Confederate leaders to think again. The less than unanimous support perhaps suggested that the voters in the South did not support the nuclear option favoured by the Confederate elites.

After the American Civil War, referendums on independence were almost forgotten. To be sure, there were debates about plebiscites to resolve the border dispute between Denmark and Germany, but these came to naught. It took a full 45 years before the next referendum on independence was held—in this case, a vote on whether Norway should secede from Sweden in a referendum in 1905. In the Norwegian case, the referendum was the brainchild of Norwegian Prime Minister Christian Michelsen. He had wrong-footed the Swedish Unionist elite by calling a surprise referendum after the Swedish king had refused to appoint a government that had a majority in the Stortinget (the Norwegian legislature). The Swedes had—without considering the consequences—dared him to hold a *folkomröstning*. Michelsen promptly accepted the challenge. The referendum was won by over 90 percent on an 84 percent (all-male) turnout (Nilson 1978, 173).

While the principle of self-determination of the people was much espoused in the wake of the First World War—especially by US President Woodrow Wilson, who had campaigned for the use of more referendums in America while he was governor of New Jersey—no referendums were held on independence for the newly established countries (e.g., Czechoslovakia or Yugoslavia) or the secession of states from established ones (e.g., Hungary and Finland). To be sure, there were several referendums on the drawing of borders in Europe—e.g., in Schleswig and in Tyrol in 1920. But referendums on outright independence were not held. It was very much the case that, as a contemporary scholar put it, “the rules governing the intercourse of states [did] neither demand nor recognize the application of the plebiscite [referendum] in the determination of sovereignty” (Mattern 1912, 171).

In the period between the two World Wars, only two referendums were held: one in 1933, on whether Western Australia should secede from Australia, and another in 1935, on whether the Philippines should become independent from the United States. In the former, a majority voted for independence, but as the National Party, which campaigned for independence, lost the election held on the same day, nothing came of it (Musgrave 2003, 95). In the latter case, a successful referendum was held on a new independence constitution after the Philippine Congress had rejected the US Congress’s Hare-Hawes-Cutting Act, which granted independence for the erstwhile overseas dependency.

However, it was not after the Second World War that referendums began to be used when areas seceded from their parent countries. Of the 56 referendums on independence since 1860, 50 have been held after 1944. Between 1944 and 1980, 13 such referendums were held (Table 1), but the vast majority of these—37 in total—occurred after 1990 (Table 2).

As shown in Table 1, there were only 13 independence referendums in the four decades after the Second World War.

**Table 1 - Independence Referendums - 1944-1980**

	PARENT COUNTRY	SECEDING ENTITY	YEAR	TURNOUT %	YES %
1	Denmark	Iceland	1944	98	99
2	China	Mongolia	1945	98	64
3	Denmark	Faroe Islands	1946	50	64
4	United Kingdom	Newfoundland	1948	52	88
5	France	Cambodia	1955	100	-
6	France	Guinea	1958	97	95
7	New Zealand	Western Samoa	1961	86	77
8	West Indian Federation	Jamaica	1961	46	60
9	France	Algeria	1962	99	75
10	Malaysia	Singapore	1962	71	90
11	United Kingdom	Malta	1964	50	80
12	United States of America	Micronesia	1975	52	59
13	Canada	Québec	1980	85	41

One would perhaps have suspected that these referendums would have pertained to decolonization, that the independence movements would have sought popular approval of their newly gained or espoused freedom. This was not the case. The elites who fought for and won independence were not, in most cases, willing to risk the political victories gained in negotiations by submitting declarations of independence to an unpredictable electorate. Indeed, the only colonies to submit the declarations of independence to referendum were Cambodia, Western Samoa and Guinea. In the first two cases, the votes were held at the instigation of the parent states, which wanted to show that there was popular support for abandoning the territories in the three entities.

The Guinean referendum was somewhat different. Held on the same day as eleven other referendums in other French colonies, on whether to take part in the newly established *Communauté française*, established by Charles de Gaulle, the Guineans, led by the independence leader Ahmed Sékou Touré, defied Paris and opted to become an independent state. 95 percent voted in support of independence. France retaliated by withdrawing all aid. However, within two years Mali, Niger, Upper Volta (now Burkina Faso), Côte d'Ivoire, Chad, the Central African Republic, the Republic of Congo and Gabon—all territories that had returned huge majorities for maintaining links with France in the referendum in 1958—became independent states. But none of the new states submitted the decision to become independent to the voters. It was almost as if referendums on independence were anathema to the independence movements.

**TABLE 2 - Independence Referendums - 1991-2011**

	PARENT COUNTRY	SECEDING ENTITY	YEAR	TURNOUT %	YES VOTE %
1	United Socialist Soviet Republics (USSR)	Lithuania	1991	91	84
2	USSR	Estonia	1991	77	83
3	USSR	Latvia	1991	74	88
4	USSR	Georgia	1991	98	90
5	USSR	Ukraine	1991	70	85
6	Georgia	South Ossetia	1991	98	90
7	Yugoslavia	Croatia	1991	98	83
8	Croatia	Serbs	1991	98	83
9	Yugoslavia	Macedonia	1991	70	75
10	USSR	Armenia	1991	95	90
11	Bosnia	Serbs	1991	90	-
12	Serbia	Sandžak	1991	96	67
13	Serbia	Kosovo	1991	99	87
14	USSR	Turkmenistan	1991	94	97
15	USSR	Karabakh	1991	82	99
16	USSR	Uzbekistan	1991	98	94
17	Macedonia	Albanians	1991	99	93
18	Moldova	Transnistria	1991	97	78
19	Yugoslavia	Bosnia	1992	99	64
20	Yugoslavia	Montenegro	1992	96	44
21	Georgia	South Ossetia	1992	99	96
22	Russia	Tatarstan	1992	62	82
23	Ethiopia	Eritrea	1993	99	98
24	Bosnia	Serbia	1993	96	92
25	USA	Puerto Rico	1993	48	73
26	USA	Palau	1993	64	68
27	Canada	Québec	1995	94	49
28	St. Kitts and Nevis	Nevis	1998	57	61
29	United States of America	Porto Rico	1998	50	71
30	Indonesia	East Timor	1999	78	94
31	Georgia	Abkhazia	1999	96	96
32	Somalia	Somaliland	2001	99	97
33	New Zealand	Tokelau	2006	65	95
34	Serbia and Montenegro	Montenegro	2006	86	55
35	Sudan	South Sudan	2011	97	98
36	Ukraine	Crimea	2014	97	83
37	United Kingdom	Scotland	2014	85	45

Source: [www.c2d.ch\(Data\)](http://www.c2d.ch(Data))(Accessed August 20, 2017)

Generally, the reasons for holding referendums in the aftermath of the Second World War were varied. In the case of Mongolia, the vote was held for geopolitical reasons at the instigation of Stalin; the vote in Algeria was held after a lengthy war of independence and negotiations, and, ideologically, Charles de Gaulle was strongly for the referendum—an instrument pioneered by his political idol Napoleon Bonaparte (Qvortrup 2014, 100). But overall it would be difficult to find a general pattern to when referendums were held after the Second World War. Not all social-science phenomena follow a law-like pattern, or as Karl Marx put it, “world history would have been a rather mysterious thing if chance didn’t play a role” (Marx 1946, 309).

In the 1970s there was only one referendum on independence: the decision of the Trust Territory of the Pacific Islands to become independent from the USA under the name of the Federated States of Micronesia in 1975 (Ranney and Penniman 1985). In the 1980s there was a similar paucity of plebiscites. The only one in the latter decade being the 1980 vote in the Francophone Canadian province of Québec, in which 59 percent, on an 85 percent turnout, rejected the secessionist *Parti Québécois*’s proposal for “sovereignty association”—a veiled description of independence.

It was only after the fall of Communism in 1989 and after the collapse of the Soviet Union in 1991 that the floodgates of independence referendums opened. As shown in Table 2, there were only 13 independence referendums in the four decades after the Second World War.

Again the reasons seem to have been varied. But, in many cases, referendums were held because the international community—especially the major European powers—insisted upon referendums in order to recognize the new states. Especially the Badinter Commission—set up by the European Communities (soon to become the EU)—stressed that referendums were a *conditio sine qua non* for recognizing new states. There is historical and anecdotal evidence to suggest that it was this requirement that prompted a large number of successor states to hold referendums, especially in the Former Yugoslavia (Radan 2000, 47).

But the referendum was also in many cases a kind of symbolic national manifestation of a newly found freedom. By voting, often almost unanimously, in an independence referendum, the new state made the plebiscite a symbolic representation of the nation itself: a mirror image of the demos and the ethnos merged into one indivisible unity. Ernest Renan’s often-cited remark that a “nation...is a daily plebiscite”—*L’existence d’une nation est un plébiscite de tous les jours*—is an accurate description of these referendums (Renan 1996, 27).

As has been argued at length elsewhere, the referendums were also held for more prosaic reasons—namely, when a new elite was under threat from external and internal powers and wanted to prove that it had popular support and the requisite legitimacy to govern (Qvortrup 2014). The celebrations of independence through referendums had ulterior motives and often displayed that “violent passion for assent, for unanimity” that Carl Friedrich and Zbigniew Brzezinski famously made the hallmark of totalitarian dictatorship (Brzezinski and Friedrich 1965, 163)

Not all of the states, of course, were recognized, and not all of the referendums were conducted in accordance with the internally recognized standards of free and fair voting.

In addition to referendums in former Soviet and Yugoslav entities, a proliferation of referendums were held in sub-national territories such as, for example, Abkhazia in Georgia and Krajina in Bosnia, where minorities sought to win approval for independence from recently declared independent states. None of these subnational votes succeeded in gaining international recognition from the international community.

While most referendums were held in former Communist countries, a few polls were held in Western democracies. In 1995 the voters in Quebec again rejected independence, this time by a whisker, and so did voters in Puerto Rico in a multioption referendum in 1993. Further in 1998, the voters in Nevis failed to meet the required threshold of 66 percent necessary to secede from St. Kitts and Nevis. It is perhaps interesting that the only unsuccessful referendums on independence have been held in countries with established democratic traditions.

Given that most referendums were held in territories with less than impeccable democratic records, it is difficult to establish what determines the outcome of a referendum. But if we broaden the category to include referendums on autonomy and devolution, there seems to be a tendency that voters are more inclined to support propositions if: (1) they are in favour of the proposition, and (2) if the government proposing the change or the secession has been in power for a relatively short period of time. In other words, it is easier to win a referendum on devolution or independence during the honeymoon period immediately after an election—something proven perhaps by the devolution referendums in the United Kingdom in 1997. Conversely, the longer you have been in office, the greater the risk of losing the referendum. In the words of American political scientist V. O. Key, “to govern is to antagonize” (Key 1968, 30). All governments break promises, fail to deliver and enact unpopular laws. A referendum can be a proxy for a vote on the record of the government. Hence, a No vote is often a positive function of the years in office, a fact perhaps most clearly shown in the Canadian referendum on a new Constitution in 1992, in which Prime Minister Brian Mulroney’s personal disapproval rating was the determining factor.

However, it should be noted that Milo Đukanović, the Prime Minister of Montenegro, had served as premier since 1991 when he succeeded in winning the independence referendum in 2006. The main factor behind winning an independence referendum is the voters’ support for the proposition (Darmanovic 2007). In the light of this, it was perhaps not surprising that a majority of the Scottish voters rejected independence in 2014—though it should be stressed that the SNP achieved a considerable feat in almost closing the gap. At the risk of simplifying matters, the nationalists lost the referendum, but they won the campaign.

### **3. Balloting to Stop Bullets?**

As was shown in the case of Bosnia, referendums on independence have sometimes resulted in civil war and conflict. Yet at other times the political split has been amicable. But despite horror examples like that of the former Yugoslavia, independence referendums rarely result in wars. To wit, in Aleksandar Pavković and Peter Radan’s much-cited *Creating New States: Theory and Practice of Secession*, the authors use six case studies to uncover the logic of secession: three violent secessions or secession attempts (Biafra, Bangladesh and Chechnya) and three peaceful ones (Norway, Slovakia and Québec) (Pavković and Radan 2007). It is interesting that the former three all have one thing in common: no referendum was held. Conversely, referendums were held in the latter, peaceful examples.

Of course this does not prove that referendums are conducive to peaceful political divorce settlements. If we use the cases of secession cited by Radan and Pavković (1900-2010), we find that 44 out of the 60 secessions or secession attempts were preceded by referendums. Of those 44 referendums, war broke out in six of the cases. In other words, the secession was achieved peacefully in 38 (86 percent) of the cases. Examples such as Bosnia and East Timor are the exceptions to the rule.

### **4. Special Majority Requirements**

Independence is an irreversible event. For this reason, it could be argued, there should be a special majority requirement in such a plebiscite. While there are examples of special majority requirements in countries with impeccable

democratic records—such as St. Kitts and Nevis—these are rare. More often than not, such requirements have been introduced as an obstructionist tactic, such as in Israel or the Soviet Union.

It is not unusual, therefore, that the *Llei del referèndum d'autodeterminació* does not contain any provisions for special majority requirements, and simply states (Art.4(4)) that “if the count of votes validly cast gives a result more affirmative than negative votes, this shall mean the independence of Catalonia.” In this, the *Llei* is in line with the Scottish referendum on independence in 2014, which was widely seen as a model for conducting an independence referendum (Walker 2014).

However, there are credible arguments for having special majority requirements. And, while these are not a requirement for a fair and legitimate referendum, it is imperative to at least outline the arguments in favour of them.

Given the momentous importance of the vote, it seems reasonable, some argue, that “if the approval rate of a referendum is too low, it ought to be discredited. A nearly simple majority does not provide sufficient legitimacy” (Baogang He 2002, 77).

Without passing judgement as to the fairness of such a requirement, it is worth outlining a few comparative examples of when such stipulations have been introduced. Turnout and quorum requirements are relatively common in referendums on independence and other referendums on ethnic and national issues. For example, in Italy the referendum result is void if turnout is below 50 percent. Conversely, the government automatically wins in Denmark if the turnout is below 30 percent.

Of course, majority requirements are not just a result of a concern for fairness and democratic legitimacy. Far from it. In politics, opportunism and ulterior motives are often presented in the guises of what we might call *democratic appropriateness*. Special majority requirements are no exception. A special majority quorum is often a mechanism of obstructionism. This was arguably the case in the late 1970, in the United Kingdom, when the Callaghan-Labour government’s proposal for Scottish and Welsh devolution was obstructed by the Labour MP George Cunningham, who introduced an amendment to the effect that devolution had to be supported by a majority that represented at least 40 percent of the eligible voters. This meant that devolution in Scotland was rejected, although a majority of those voting voted Yes in the referendum in 1979.

This type of obstructionism, albeit in a different setting, was also the motivation behind Soviet leader Mikhail Gorbachev’s insistence that a two-thirds majority should be required for secession in Latvia. The Soviet leader was not the only one seeking to use obstructionist tactics. The Israeli Knesset passed a similar rule to the effect that a peace deal with the Palestinians must be supported by a supermajority. It is telling that parties opposed to returning the occupied territories to the Palestinians introduced the law. In the light of these examples, it was unsurprising that one of the demands made by the Khartoum government before the independence referendum in South Sudan in 2011 was that at least 60 percent turn out to vote.

The Canadian *Clarity Act*, passed by the Liberals (a unionist party) in response to a court ruling that a referendum in Québec would have to be decisive for the result to stand, is often (but inaccurately) cited a precedent for supermajority requirements. Paradoxically, the Canadian Act does not provide a special percentage—it does not provide ‘clarity’—rather it merely states:

[The House of Commons shall consider] whether, in the circumstances, there has been a clear expression of a will by a clear majority of the population of that province that the province ceases to be part of Canada. Factors for House of Commons to take into account include (2) (a) the size of the majority of valid votes cast



in favor of the secessionist option; (b) the percentage of eligible voters voting in the referendum; and (c) any other matters or circumstances it considers to be relevant (Parliament of Canada 2000).

A better example of a supermajority requirement, albeit a small one, was used in 2006 in Montenegro. The law stipulated that independence would be approved if supported by 55 percent of those eligible to vote. The total turnout of the referendum was 86 percent. 55.5 percent voted in favour and 44.5 percent were against breaking the state union with Serbia.

Another—perhaps more unusual example is St. Kitts and Nevis in the Caribbean. Under the Constitution, Nevis has considerable autonomy and has an island assembly, a premier and a deputy governor general. Under certain specified conditions, it may secede from the federation. In June 1996, the Nevis Island Administration under the Concerned Citizens' Movement led by Premier Vance Amory—a former international cricketer with a batting average of a far-from-impressive 23.2!—announced its intention to become independent. Secession requires approval by two thirds of the assembly's five elected members and by two thirds of voters in a referendum in accordance with Article 38.1 (b) of the Constitution. After the Nevis Reformation Party blocked the Bill of secession, Amory called for elections for February 24, 1997. Although the elections produced no change in the composition of the assembly, the Premier pledged to continue his efforts towards independence. A referendum—which could be regarded as *ultra vires*—was held in 1998, but only 61 percent voted in favour of the proposition, and hence the referendum failed.

A similar mechanism exists in tiny Tokelau (a part of New Zealand), where a self-determination referendum also failed to reach the required quorum. Yet, these examples are, given the small size of the countries, not likely to create precedence in the sense of an international norm with the force of international law.

In most other referendums (e.g., East Timor in 1999, Malta in 1964 and the referendums on independence for former Soviet States in 1991), there were no special majority requirements. While it is certainly possible to cite examples of special majority requirements, it cannot in fairness be said that the simple majority requirement in the Scottish referendum was at odds with international norms. Consequently, it is reasonable and entirely consistent with international practice that *Llei del referèndum d'autodeterminació* merely requires that there be more “affirmative than negative votes” for independence to be approved.

### 5. Who Is Allowed To Vote?

Who is a member of the demos? Who is a voter? Are you still a part of the demos if you leave the country, or are you then merely a part of the ethnos?

The *Llei del referèndum d'autodeterminació* states (Art. 6(1)) that “all those persons with the right to vote in the elections to the Parliament of Catalonia shall be able to vote.” This is similar to the *Scottish Independence Referendum (Franchise) Act 2013*, which granted the right to vote to all EU and UK citizens who were entitled to vote in the Scottish Parliament elections.

However, in the Scottish case, the franchise was limited to those with residence in Scotland. In the Catalan case, Art. 6(1) opens the possibility that “Catalans resident abroad shall be able to vote.” This raises the questions whether expats should be entitled to vote.

In the case of East Timor, voters living outside the entity were entitled to vote, (something which is also true in ordinary referendums in Australia). In Luxembourg, recent guidance similarly states that the eligible voters are “les électeurs inscrits sur les listes électorales pour les élections législatives au jour du référendum” (Élections Luxembourg 2017, accessed August 25, 2017).

Conversely, in the independence referendum in Montenegro in 2005, only those living in the country, no matter what ethnicity they were, were entitled to vote (Darmanovic 2007). This precedent and recent case law from the European Court of Human Rights have suggested that it is justified in allowing voters living only in one's jurisdiction to vote. However, the issue of voting rights for non resident citizens is, as the European Court of Human Rights noted in *Schindler v. United Kingdom*, to be "kept under review" as "there is a clear trend in favour of allowing voting by non-residents."

Nevertheless, it is questionable whether those living outside a jurisdiction have thereby forfeited their right to vote. Some litigation in Europe suggest as much. For example, in an *obiter dictum* in *Matthews v. United Kingdom*, the European Court of Human Rights found that "persons who are unable to take part in elections because they live outside the jurisdiction...have weakened the link between themselves and the jurisdiction," and can consequently not claim a right to vote" (*Matthews v. United Kingdom* 1999). This ruling was recently reinforced by *Schindler v. United Kingdom*. Though, in the latter case, the European Court of Human Rights held that "the matter may need to be kept under review in so far as attitudes in European democratic society evolve." It continued that "the margin of appreciation enjoyed by the State in this area still remains a wide one" and as a consequence citizens of countries that are signatories to the European Convention of Human Rights do not have a right to vote in national elections and referendums. But the law may change as "there is a clear trend in favour of allowing voting by non-residents, with forty-four States granting the right to vote to citizens resident abroad otherwise than on State service" (*Schindler v. United Kingdom* 2013). However, it is still permissible to deny non-residents the right to vote. This might justify the exclusion of Montenegrins living in Serbia in the 2006 referendum. Conversely, there are examples of voters in the diaspora being entitled to vote. For example, in Eritrea in 1993, the voters living outside the country were allowed to vote. However, in both cases this inclusion of expats was, arguably, justified on account of the displacement that took place due to violent conflicts. If the franchise were to be restricted to those living in Catalonia, this would be legal (i.e., both consistent with the judgements of the European Court of Human Rights notwithstanding *Schindler* and politically consistent with the Montenegro and Scotland precedents).

However, in the case of Catalonia, Article 6(1) refers to "Catalans resident abroad." This category is limited to those "whose most recent registration was in Catalonia" (Parliament of Catalonia 2017). This formulation begs the question—unanswered in the *Llei del referèndum d'autodeterminació*—Who is a Catalan? The answer to this demarcation question could potentially be seen as discriminatory if a Catalan is defined ethnically. Pragmatically, the problem can be resolved using the criteria applied in the case of South Sudan. In the 2011 referendum, displaced people living outside the entity seeking independence were entitled to vote if they were either born in South Sudan or if their parents were born in the territory after 1956 (the year Sudan gained its independence). Such a precedent would be politically consistent with international practice. Whether it would be consistent with the jurisprudence of the European Court of Human Rights is a question that would require a separate study.

## 6. The Wording of Referendum Questions

Art. 4(2) of the *Lleidel referèndum d'autodeterminació* states that "the question to be asked in the referendum is: '*Do you want Catalonia to be an independent state in the form of a republic?*'" (Parliament of Catalonia 2017, italics in the original). This question is unambiguous and clear. It seems to be close to the question in the *Scottish Independence Referendum Act 2013* (Art. 1(2)): "Should Scotland be an independent country?" Compared to other referendum questions, such as the question in the Québec referendum in 1995, the Catalan question provides a model of clarity.

But does the wording of the question matter? There has, perhaps understandably, been considerable debate about the wording of the question on the ballot in referendums on independence. The Scottish government's decision in 2012 to include the word "agree" in the proposed question on the ballot in the 2014 referendum led to criticism that they were trying to influence the result by using positive language that could sway voters. The argument—credibly enough—was that a biased and one-sided question could prompt the voters to vote Yes to a question that they—had they understood it—would have rejected. This has always been a charge against referendums on divisive issues. But is it a real danger in referendums on independence? Will the voters be swayed by rhetorical questions? Or is the question on the ballot of minor importance, as the voters know the question from the debate?

It is difficult to answer this question with any degree of mathematical certainty. While this author (Qvortrup 2014, 142) found that longer questions are statistically correlated with a higher No vote, the evidence from the same study suggested that the presence of "emotive words" tended to backfire and that words like "agree" or "approve" corresponded with voter disapproval. However, given the linguistic problems of translating the terms, these statistical findings—while theoretically interesting—do not provide conclusive evidence of the effect or lack of effect of the wording of the questions. To determine whether the question on the ballot has any effect in referendums pertaining to issues of national self-determination, one must consider some of the examples of recent years.

Referendum questions have come in many shapes and sizes, from the blatantly biased to the bland. In Northern Ireland, in 1998, the voters were asked to approve (or not to approve) the rather neutral question "Do you support the agreement reached in multi-party talks on Northern Ireland and set out in Command Paper 3883?" 71.2 percent did. The Command Paper 3883 was a coded reference to the official document containing the Belfast Agreement on power-sharing.

There are several examples of similar questions that have not created a bias. For example, in 1999, in East Timor, the voters were asked the question: "Do you *accept* the proposed special autonomy for East Timor within the Unitary State of the Republic of Indonesia?" (italics added). A majority of the voters—close to 75 percent—*rejected* the proposal with the result that East Timor became independent. In this internationally monitored referendum, the value laden word "accept" did not swing the voters.

A similar conclusion could be drawn from the referendum in Québec in 1995. In this referendum, the voters were asked a question that included the word "agree"—namely, "Do you *agree* that Quebec should become sovereign after having made a formal offer to Canada for a new economic and political partnership within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?" (italics added). While the result was very close (the proposal was defeated by just over 50 percent), there was no indication that the wording of the question swayed the voters. The citizens had learned about the pros and cons of the proposed "sovereignty" during the campaign (Blaise et al. 1995).

In both East Timor and Québec, it seems that an attempt to bring the voters to support a proposition by using positive language failed.

So what questions have been asked? There is no standard format, but a quick look at recent examples may be illustrative.

In 2006 the voters in Montenegro voted 55.5-44.5 for independence by supporting the proposition "Do you want

<sup>1</sup> The question in 1995 Québec referendum was "Acceptez-vous que le Québec devienne souverain, après avoir offert formellement au Canada un nouveau partenariat économique et politique, dans le cadre du projet de loi sur l'avenir du Québec et de l'entente signée le 12 juin 1995?"

the Republic of Montenegro to be an independent state with a full international and legal personality?" The question was drafted with the help of the EU. This was also the case in Eritrea in 1993. As in Montenegro, an international committee drafted the question on the ballot on independence from Ethiopia. Having been advised by the United Nations, the parties opted for the question "Do you want Eritrea to be independent?"

Another example of a simple question was provided by the UN-organized referendum in South Sudan in 2011. In this referendum, the voters—many of whom were illiterate—were presented with two images and the text in both Arabic and English saying either "separation" or "unity." During the negotiations between the Sudanese government in Khartoum and the pro-independence SPLM/A movement in South Sudan, the latter expressed reservations about the positive connotations of the word "unity" and the negative connotations of the word "separation." However, on polling day, these "positive" words did not sway the voters. Independence was supported by 99 percent in a reasonably fair referendum monitored by the United Nations.

These examples do not conclusively prove that referendum questions have no effect on the outcome, but it is noteworthy that the attempts to use positive language in both Québec and East Timor—and to a lesser degree in South Sudan—failed to sway the voters in massive numbers. Needless to say, the results do not tell us anything about the motives of the individual voters. But we have no evidence from qualitative or quantitative research that suggests that the question mattered; if anything, the result in East Timor and the Sudan show that those who attempted to use value-laden words went down to conclusive defeats. Whatever the answer to this question, the proposed question in Catalonia is fair, precise and unambiguous.

### **7. The Administration of the Referendum**

The *Llei del referèndum d'autodeterminació* specifies—albeit briefly in comparison with other comparable jurisdictions—how the referendum will be conducted. Thus Article 16 specifies that the *Electoral Commission of Catalonia* will be responsible for the conduct of the referendum, that the members will be "appointed by absolute majority of the Parliament of Catalonia" (Art. 19). While Article 17 stresses that the Electoral Commission is established as an independent, impartial and permanent body," the proposed body is unlike similar bodies in comparable jurisdictions. The fact that the body is appointed by "an absolute majority of the Catalan Parliament" seemingly puts to rest any questions about its perceived impartiality, if by an "absolute majority" is meant that the opposition get a say. Yet this is not clear. It would be useful to know what is meant by an "absolute" majority.

If merely "a majority" appoints the Commission, then questions will be raised regarding impartiality, and hence the legitimacy of the vote. In a highly politicized environment, it is important that the committee be seen to be impartial. In addition to selection by a supermajority, one or both of two ways could accomplish this. For example, one could stipulate that the decisions by the Commission require a three-quarters majority, as was the case with the Burundi Referendum Commission (see further Qvortrup 2014, 129). Or, Catalonia could follow the precedent of the Montenegrin Republican Referendum Commission (RRC), whose membership consisted of "equal representation of both options participating in the referendum" (Law of the Legal Status of the Republic of Montenegro, Art. 10). As matters are stated in the *Llei del referèndum d'autodeterminació*, the proposed commission is consistent with the expected international practice on impartial referendum commissions, provided the members are selected by more than a simple majority.

Another area of contention in relation to referendums is who represents the two sides. It is fundamental and part of the *raison d'être* of the referendum that it not follow party lines. The referendum is fought by two opposing sides and not necessarily by political parties that represent opposing views on the matter before the voters.

There are ways of resolving this issue. In the United Kingdom and in Québec, the two sides are represented by “umbrella organizations”. These are limited in the amount of money they can spend (in Britain up to approximately €5 million). The umbrella organizations in Britain are each given a public subsidy up to a maximum of the equivalent of €500 000 (see Qvortrup 2006 for an overview of these rules).

*Llei del referèndum d'autodeterminació*, by contrast, is focussed entirely on political parties, and there are no provisions for, let alone mention of, umbrella organizations in the relevant part of the Llei (see Art.11). Nor are there provisions for public funds or limits to campaign spending. While the rules in Britain and Québec provide an equal playing field, it ought to be noted that these provisions are not present in all European states. While such rules are desirable, Catalonia is not exceptional in not having these provisions.

### **8. The Legality of Referendums**

The specific legality—or lack of legality—of the referendum will be discussed elsewhere in this report. As a general rule, subnational jurisdictions have to comply with the limits to their powers. To pass legislation outside these constitutionally proscribed boundaries would – to use a legal expression – be *ultra vires*. Yet, without pronouncing on the constitutionality or non-constitutionality of *Llei del referèndum d'autodeterminació*, the international practice—if not the law—is open to a variety of options that (to put it conservatively) leave considerable political room for manoeuvring.

Hence, while the rule is that referendums should be held in accordance with existing constitutions (such a provision exists in Article 39(3) of the Ethiopian constitution, but in few other states) or following an agreement between the area that seeks secession and the larger state of which it is part (this is what happened in the very different cases of Scotland, 2014, and South Sudan, 2011), very few constitutions provide rules relating to referendums or agreements relating to the secession of one its constituent units.

Based on this logic, the Soviet leader Mikhail Gorbachev was, legally and constitutionally, within his right to claim that the Latvian, Estonian and Lithuanian referendums on independence in the spring of 1991 were illegal and that he was the guarantor of *pravovoe gosudarstvo*—the equivalent of the rule of law in Soviet jurisprudence. Yes, previously, under the so-called *Stalin Constitution 1936*, individual Soviet states did indeed have the right to self-determination referendums under Article 48. But this provision had been dropped in the *Khrushchev Constitution of 1956*. Consequently, the Baltic republics were in breach. Yet matters are not that simple. Yes, all other things being equal, a country only has a right if it follows the rules. *Llei del referèndum d'autodeterminació vinculant sobre la independència de Catalunya* is interesting as it declares that Catalonia has a right to self-determination as a consequence of “The International Covenant on Civil and Political Rights approved by the United Nations General Assembly on 19 December 1966,” and maintains that Spain—with a monist international legal system—has to follow international law (Art. 96).

Legally speaking, this seems to be inconsistent with international case law (such as most recently stated in the Kosovo case) and by authorities on international law (see Crawford 2006).

In practice, a state seems entitled to hold an independence referendum if all other democratic avenues are blocked. Thus, when a region is part of an undemocratic constitutional order, matters are a bit more complex than Crawford (2006) suggests. As the legal scholar Antonio Cassese has argued,

when the central authorities of a sovereign State persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny them the possibility of reaching a peaceful settlement within the framework of the State structure...a group may secede – thus exercising the most radical form of external self-determination – once it is clear that all attempts to achieve internal self-determination have failed or are destined to fail (Cassese 1995, 119-120).

As Iraq is not a well-functioning democratic state, it could be argued that Kurdistan meets these criteria. (Kurdistan is planning a referendum at the time of writing.)

Given that Spain is a democratic state, this rule hardly applies to Catalonia. Is the referendum in the Spanish *autonomias* consequently illegal? Again, matters may not be that simple. To be sure, the Spanish Courts have been adamant that a referendum is illegal, yet other courts in countries with similar disagreements have followed a different logic. In the famous Canadian case *Re Quebec*, in which the Supreme Court of Canada was asked the question “Under the *Constitution of Canada*, can the National Assembly, legislature or Government of Quebec effect the secession of Quebec from Canada unilaterally?”, the Court held that while the “secession of Quebec from Canada cannot be accomplished...unilaterally,” a referendum itself was not unconstitutional, but a mechanism of gauging the will of the francophone province. Consequently, a referendum, provided it resulted in a “clear majority,” “would confer legitimacy on the efforts of the Quebec government” (Supreme Court of Canada 1998, 385). In other words, a result in favour of secession would require the rest of Canada to negotiate with Québec. Needless to say, this ruling does not apply in Spain. But the Canadian example suggests that other countries’ courts have shown a flexibility and appreciation of nuances that is conducive to compromises.

These examples would seem to suggest that the international law pertaining to independence referendums is clear and simple. Alas, this is very far from being the case. While governments may confidently cite principles, the practice of independence referendums—seemingly owes more to national interests than to adherence to principles of jurisprudence. For example, the states of Western Europe readily recognized the secessions of several former Yugoslav republics in the early 1990s—although these new states did not adhere to the aforementioned legal principles. And yet, in other cases, international recognition has been less forthcoming. No state has to date recognized the outcome of Nagorno-Karabakh’s referendum in 1991, although Azerbaijan is very far from being a democratic state (the country has a Freedom House Score of 7—the same as North Korea!), and despite the greater freedoms for the citizens/inhabitants of the breakaway republic. Similarly, no state recognized the referendum in Somaliland, although this enclave is considerably more democratic, peaceful and respecting of the rule of law than Somalia, at the time an archetypical failed state. For all the legal arguments, acceptance of referendum results is ultimately a political rather than a legal decision.

### **9. An Assessment of the Draft Law on the Self-Determination Referendum**

Without dwelling on the legality or illegality of the proposed Catalan referendum (i.e., the question of whether there is or is not a legal right to decide and to hold such a vote or on whether the referendum is *Ultra Vires*, as argued by the Madrid government—these issues are discussed in Daniel Turp’s chapter), it is imperative that we address the compatibility of the Llei del referèndum with international norms and regulations.

The philosopher José Ortega y Gasset stated that “the health of democracies, of whatever type and range, depends on a wretched technical detail – electoral procedure. All the rest is secondary” (Ortega y Gasset 1964, 158). This is especially true for referendums.



While the law provides a model of clarity as regards the question on the ballot, one of the general objections against the *Llei del referèndum* is precisely that it is rather short on detail. Compared to the *Scottish Independence Referendum Act 2013*, it leaves many issues unanswered. Yet in most areas the law is consistent with the international practice as exemplified by the legislation in Scotland and Montenegro. In the following, each of the main issues of how to conduct a fair referendum will be addressed in turn.

- **The wording of the question.** *Llei del referèndum* is exemplary when it comes to the wording of the question. While opinion is divided as to the importance of the wording in influencing the voters, the very clear and unambiguous question proposed in Article 4(2) is short, succinct and clear. This will add legitimacy to the process.

- **Special majority requirement.** While some countries have special majority requirements in referendums, there is no requirement for these. A strong political case can be made that special majority requirements are warranted in matters of great importance (e.g., Switzerland and Australia require both a majority of voters and a majority of the states). However, the precedents from independence referendums do not suggest that these are required. In Scotland, only a simple majority was required. The Catalan referendum is consistent with international norms in *not* having a special majority requirement.

- **Who is entitled to vote.** Notwithstanding the European Court of Human Rights' ruling in *Schneider*, the *Llei del referèndum* is consistent with recent precedents giving the vote to all residents who are eligible to vote for the Catalan Parliament. While some might raise doubts over the wording of Article 6, especially that "Catalans residents abroad" are entitled to vote, these concerns can be addressed by clearer provisions—e.g., as in the South Sudan referendum on independence in 2011. However, the wording of this clause is not elegant and could give rise to unnecessary uncertainty and resultant legal challenges.

- **Administration of the referendum.** *The Llei del referèndum* goes into considerable detail regarding the establishment and composition of the electoral commission (see Arts. 17-25). While said articles stress the democratic nature of the commission, the details of the selection of the commissioners raise some questions. The provision that the commissioners be appointed by an "absolute majority" in parliament seems to suggest that the opposition gets a say on which commissioners are chosen. If that is the case, the *Llei del referèndum* is consistent with international practice. However, if a simple majority chooses the members of the Electoral Commission, then the law is not in line with the best-practice models of referendums.

- **Umbrella organizations.** *The Llei del referèndum* suggests that the political parties are the driving forces in the referendum campaign. Given the polarized nature of Catalan politics, this is likely to be an accurate prediction. However, the emerging practice in referendums is to designate two umbrella organizations to run the campaign. In some best-practice cases—the United Kingdom and Québec—these have further been given public grants to cover expenses and to ensure a level playing field. Such provisions are not mentioned in the *Llei del referèndum*. This is not a fatal omission, but, given that Catalonia aspires to become a member of the European Union, it is not unreasonable to expect that the rules for conducting referendums reflect best practices in countries like the UK and Ireland (countries that are recognized for holding fair and legitimate referendums).

It is possible to criticize *the Llei del referèndum*. The law is short on detail compared to similar legislation in Scotland. This can lead to uncertainty, legal challenges and lack of political legitimacy. However, the overall conclusion is that *the Llei del referèndum* meets the *minimal* requirements for conducting a fair referendum. This is notwithstanding questions regarding the selection of the referendum commission and the lack of rules regarding umbrella organizations.



Regardless of whether the referendum is legal constitutionally or compatible (or not) with international law, *the Llei del referèndum* is consistent with best practices on international referendums.

## **10. Conclusion**

Before outlining the conclusions as to the *Llei del referèndum*'s compatibility with international practice, it is worth putting it into context by summarizing the past 150 years of practice with independence referendums.

Referendums on independence have come in waves. Beginning in the 1860s, when several of the Confederate states seceded from the Union in the United States (and hence precipitated the Civil War), secessionist referendums were held in Norway (1905), the Philippines (1935) and unsuccessfully in Western Australia in 1933.

Generally, referendums on independence became common only after the fall of the Soviet Union—possibly because a number of Western states insisted on the ratification of declarations of independence in referendums. But referendums were also held as a kind of national celebration of the newly established unity.

Most referendums have been held in countries with relatively weak democratic institutions. The often large Yes majorities suggest that the votes are not always free and fair—though the more than 99 percent support in the referendums in Norway (1905) and Iceland (1944) suggest that massive majorities are not confined to nondemocratic states.

In the few independence referendums that have been held in democratic countries, it seems that governments have tended to win the plebiscites if they have taken office recently and only if there is broad popular support for independence before the campaign.

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# V.CATALONIA'S "RIGHT TO DECIDE" UNDER INTERNATIONAL, EUROPEAN, SPANISH, CATALAN AND COMPARATIVE LAW

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1. **Introduction**
2. **The Right To Decide and International Law**
3. **The Right To Decide and European Law**
4. **The Right To Decide and Spanish Law**
5. **The Right To Decide and Catalan Law**
6. **The Right To Decide and Comparative Law**
7. **Conclusion**

## 1. Introduction

The right to self-determination has become a prominent feature of the debate surrounding the future political status of Catalonia. As the Catalan scholar Jaume López wrote, "In the last few years, conceptual and political affirmation of the right to self-determination, especially in a liberal and democratic context, has experienced new treatment, justifications and implications that indicate new patterns, both in the regulatory and argumentative area, and in the strategic and political ones. We may consider the appearance of a new concept, 'the right to decide', as a reflection of these new trends" (Lopez 2015, 28).

Having inspired the creation of the *Plataforma pel Dret a Decidir* (Platform for the Right to Decide) (PDD) in 2005, as well of the *Pacte Nacional pel Dret a Decidir* (*National Pact for the Right to Decide*) in 2013, the concept of the right to decide emerged as a slogan during the rallies that brought millions of Catalans together in Barcelona between 2006 and 2010. The "right to decide" was invoked as the basis for the organization of a significant number of referendums on independence at the municipal level in 2008 and 2009. It was also opposed to the 2010 "sentencia" of the Spanish Constitutional Court, which declared Catalonia's new *Statute of Autonomy* unconstitutional in several of its key provisions, ignoring the fact that this new Statute had been approved by both the Parliament and the people of Catalonia, as well as by the Spanish Parliament itself.

The right to decide was very explicitly referred to in the *Declaration on Sovereignty and the Right to Decide* adopted by the Parliament of Catalonia on 23 January, 2013, and was carefully analyzed in the white paper and reports published by the Consell Assessor per a la Transició Nacional in 2014 and 2015 (Government of Catalonia, *White Paper on the National Transition of Catalonia—Synthesis* 2014, and "The Process for Holding the Consultation Regarding the Political Future of Catalonia: An Evaluation" 2015). It was again invoked in support of the participatory consultation process of November 9, 2014, (9N) and of the September 27 (27S) election.

Following this election, political parties favouring the right to decide held a majority of seats in Parliament and their members adopted several resolutions referring to this right, including *Resolution 1/XI of 9 November 2015 on the Start of the Political Process in Catalonia as a Consequence of the Electoral Results of 27 September 2015* and *Resolution*

263/XI of 21 July 2016 *Ratifying the Conclusions of the Commission on the Constituent Process*. In its Resolution 306/XI of October 6, 2016, the Catalan Parliament declared that a referendum on independence would be held in September 2017 and constituent elections in March 2018. The most recent reference to the right to decide is contained in the *Law Relating to the Self-Determination Referendum*, which adopted on September 6, 2017.

Keeping this historical context in mind, we will now analyze the right to decide, which is presented as the legal basis of the Catalan quest for self-determination. I will do so in light of rules found in international, European, Spanish, Catalan law and comparative law.

## **2. The Right To Decide and International Law**

The first legal recognition of a formal right to self-determination in international law occurred in San Francisco, when States agreed to include a provision in the *Charter of the United Nations* affirming that nations should “develop friendly relations [...] based on respect for the principle of equal rights and self-determination of peoples.” This principle was defined further in 1960 in both the *Declaration on Granting Independence to Colonial Countries and Peoples* as well as in the resolution relating to the *Principle Which Should Guide Members in Determining Whether or Not an Obligation Exists To Transmit the Information Called For in Article 73[e] of the Charter of the United Nations*.

Article 1(1), common to both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, clarified the identify of the beneficiaries of the right and the exact meaning of the right to self-determination : “All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.”

The General Assembly of the United Nations further defined the principle of equal rights and self-determination of peoples when it adopted the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (Declaration on Friendly Relations)*, which affirmed three modes of implementing the right to self-determination—namely, “[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people.” Hence, the right to self-determination should not necessarily lead to national independence, and may very well take other forms, including autonomy.

The foregoing international instruments, as well as the *Helsinki Final Act*, the *Charter of Paris for a New Europe* and the *Vienna Declaration and Programme of Action*, clearly grant “all” peoples a collective right to freely determine their political status.

The provisions of these various instruments clearly state that the “right to decide” is universal in nature. Nevertheless, there have been numerous attempts to give a restrictive interpretation to the right to self-determination and to limit the ambit of such right. For colonial peoples, all forms of political status can be achieved through the exercise of their right of self-determination, including the right to external self-determination—i.e., to become sovereign and independent states. For noncolonial peoples, the right to self-determination would not generally include such a right to independence, or external self-determination, and would limit itself to a right of internal self-determination. Noncolonial peoples could claim a right to external self-determination only if the conditions for “remedial secession” referred to in the safeguard clause of the *Declaration on Friendly Relations* were met:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government

representing the whole people belonging to the territory without distinction as to race, creed or colour.

Thus, in cases where a state is “possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour,” its “territorial integrity or political unity” would prevent noncolonial peoples from exercising a right of external self-determination and remedial secession as a mode of exercising its right of self-determination (Buchheit 1978; Vezbergaitė 2011 and Catala 2017).

In its *Reference re Secession of Québec (Québec Secession Reference)*, the Supreme Court of Canada agreed with such a reasoning in stating: “International law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states” (§ 122). In the Court’s opinion, inasmuch as a people benefits from *internal* self-determination (i.e., autonomy), the State’s territorial integrity takes precedence over their right to *external* self-determination (i.e., secession):

A State whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity. (§ 130)

In the Supreme Court’s opinion, *external* self-determination—as opposed to *internal* self-determination—is granted only to the peoples “under colonial rule or foreign occupation” (§ 131) or, according to some, to peoples whose right to *internal* self-determination “is somehow being totally frustrated” (§ 135) in the sense where they are “denied meaningful access to government to pursue their political, economic, social and cultural development” (§ 138).

This opinion given by the Supreme Court of Canada in *Reference re Secession of Québec* was formulated ten years before the International Court of Justice’s 2010 *Advisory Opinion on Kosovo*. Quoting the *Declaration on Friendly Relations*, as well as other international instruments recognizing the right of self-determination, the ICJ clearly defined the scope of the territorial integrity principle:

In General Assembly resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations”, which reflects customary international law (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 101-103, paras. 191-193), the General Assembly reiterated “[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State”. This resolution then enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States. In the same vein, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference) stipulated that “[t]he participating States will respect the territorial integrity of each of the participating States” (Art. IV). Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States. (§ 80)

Although the ICJ did not find necessary to discuss the issue of remedial secession (§§ 82 and 83), the foregoing statement challenges the commonly held view—including by the Supreme Court of Canada—based on the safeguard clause of *Declaration on Friendly Relations* that the territorial integrity of states takes precedence over the right of self-determination of peoples. Thus, this clause can no longer be invoked to negate the right to external self-determination and independence of noncolonial peoples and should be construed as allowing “all peoples” to choose to exercise the right of external self-determination and to establish a sovereign and independent state.



Moreover, the Court found it useful to rule upon the question of the legality of a unilateral declaration of independence. The ICJ came to the conclusion that international law does not prohibit such unilateral declarations for the following reasons:

In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation [...]. A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases. (§ 79)

There are some publicists who continue to support the idea that the right of self-determination—and notably the right to establish a sovereign and independent state—belongs only to colonial or oppressed peoples (Crawford 2006; Radan 2012 and Botella 2017). But, in our opinion, the views expressed by the International Court of Justice have contributed to restoring the original scope of the right of self-determination, including the right to establish a sovereign and independent state enshrined in the *Charter of the United Nations* as interpreted by the *Declaration on Friendly Relations* and in the *International Covenants on Human Rights* to which Spain is bound, and which it must, in accordance with article 26 of the *Vienna Convention on the Law of Treaties*, perform in good faith.

### **3. The Right To Decide and European Law**

With regards to European law, the question of the “right to decide” of peoples who are component units of member States of the Council of Europe or of the European Union has not given rise to considerable attention (Levrat 2014).

Unlike the *Charter of the United Nations* and although there are two references to peoples in its preamble, the *Statute of the Council of Europe* does not refer to any right to self-determination of such peoples. The *European Convention on Human Rights* and its protocols, the *European Social Charter* and the numerous other human rights treaties do not mirror the *International Covenants on Human Rights* and nowhere in the treaty law of the Council of Europe can be found an equivalent to article 1 common to the *Covenants*. Yet, the European Court of Human Rights was given an occasion to discuss this issue. In its 2001 judgment in the case of *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, the Court found that Bulgaria had violated article 11 of the *European Convention on Human Rights* (freedom of assembly and association) in prohibiting an organization from calling for autonomy for the region of Pirin Macedonia or even secession from Bulgaria. Referring to the principle of democracy, the Court opined:

Demanding territorial changes in speeches and demonstrations did not automatically amount to a threat to the country’s territorial integrity and national security. The essence of democracy was its capacity to resolve problems through open debate. Sweeping bans on freedom of expression and assembly, other than in cases of incitement to violence or rejection of democratic principles, did a disservice to democracy and often even endangered it. In a democratic society based on the rule of law, political ideas which challenged the existing order and whose realisation was advocated by peaceful means had to be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means. The Court concluded that the probability that

separatist declarations would be made did not justify the ban on Ilinden's meetings. (§ 97)<sup>1</sup>

Although one cannot derive from such statement a collective "right to decide" for a people, the reference to democracy, democratic principles and democratic society is a reminder that the issue of the political status of a people is clearly linked with the democratic principle.

Although the *Treaty on European Union (TEU)* clearly grants to member States a right to decide to withdraw from the European Union (art. 50)—a right that is now being enforced through the ongoing process that should lead to the Brexit<sup>2</sup>—the law of the European Union does not explicitly confer to "peoples" within member States an equivalent right to decide to withdraw for these member States. There are several references to "peoples" in the *Treaty of European Union* (preamble § 13, art. 1 § 2 and art. 3 § 1 and § 5) and the *Treaty on the Functioning of the European Union (TFEU)* (preamble §1 and art. 167 § 2). But these references are not accompanied by a recognition for such peoples of a "right self-determination," a "right to decide" or a "right to withdraw."

The *Charter of Fundamental Rights of the European Union*, which has the same legal value as the other EU treaties (*TEU*, art. 6), refers to the "peoples of Europe" in the opening paragraph of its preamble. Paragraph 3 of the same preamble further states that "[t]he Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe." These two preambular provisions cannot, however, be construed as a recognition of a right to decide. Such a right cannot be found in article 22 either, which stipulates that "the Union shall respect cultural, religious and linguistic diversity." This article imposes an obligation on the Union rather than confers a right for the peoples and does not clearly identify peoples as the creditors of the obligation. A last provision of the *Charter of Fundamental Rights* deserves some attention. Article 53 reads: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

This article 53 on the level of protection of human rights within the European Union is not meant to be the source of a "right to decide." Yet, the Charter's reference to international law and international agreements to which member States are party can be a reminder that they must respect the right of self-determination of peoples as recognized by international law generally and, more specifically, by agreements such as the *International Covenants on Human Rights*, which all clearly grant peoples, as I have previously argued, a universal right to self-determination under their common article 1.

Could a right to decide for peoples of Europe derive from sources of European Union Law other than the founding treaties and the *Charter of Fundamental Freedoms*? Among the other sources of European Union law are the "general principles" as they result from the constitutional traditions common to the member States. Therefore, does a constitutional tradition common to member States exist with regards to the right to decide?

<sup>1</sup> See also two other similar judgments that also led to a conclusion of violation of article 11 of the European Convention on Human Rights: European Court of Human Rights, *United Macedonian Organisation Ilinden and Ivanov v. Bulgaria*, Application no 44079/98, 20 October 2005 and *United Macedonian Organisation Ilinden PIRIN and Others v. Bulgaria*, Application no 59489/00, 20 October 2005.

<sup>2</sup> It is interesting to note that in her "Brexit letter," Prime Minister Theresa May presents the referendum on Brexit as "a vote to restore, as we see it, our national self-determination." The full text of the letter is online: <http://www.bbc.com/news/uk-politics-39431070> (accessed August 24, 2017).

On the one hand, a tradition of recognition of a “right to decide” seems to be emerging through the positions taken by countries such as the United Kingdom vis-à-vis Scotland or Denmark vis-à-vis Greenland or the Faroe Islands. Yet, not all members of the European Union have as yet espoused such a tradition. The attitude of Spain in its relation to the Basque Country, Catalonia and Galicia; Italy with the South Tyroleans or France with many of its peoples can be seen as preventing a common constitutional tradition from fully emerging.

On the other hand, there seems to be an emerging common constitutional tradition that acknowledges the holding and the results of referendums relating to independence within the European Union, as seen with the 2014 Scottish referendum, to which no member state of the European Union raised objections. In relation to peoples that are not components of member states of the European Union, the acknowledgment of the results of independence referendums conducted in the three Baltic States, as well as in Croatia and Slovenia—as well as the international recognition and the admission to the European Union of these five new states—now amounts to a consistent practice among the member states of the EU. This suggests that a common constitutional tradition has emerged and that peoples who will claim and exercise their “right to decide” could benefit from this new common constitutional tradition of independence-referendum acknowledgment.

#### **4. The Right To Decide and Spanish Law**

In creating a unitary state, the 1978 Spanish Constitution appears to stonewall the right to decide of its constituent peoples. Although its preamble recognizes the existence of various “peoples in Spain,” the duty to protect their “culture and traditions, languages and institutions” is entrusted to the Spanish people. These statements of principle are echoed in articles 1 and 2 of the Constitution, respectively enunciating that the “[n]ational sovereignty belongs to the Spanish people,” and setting forth the “indissoluble unity of the Spanish Nation” and the indivisibility of the Spanish homeland. In addition, article 149 (1) (32) provides that the Spanish State have exclusive jurisdiction to authorize “popular consultations through referendums.”

Therefore, it appears that the mere text and evident rationale of the Spanish Constitution literally bars all peoples residing therein from holding a referendum on the issue of one people’s political status. This reasoning was twice recognized by the Spanish Constitutional Court, which ruled that both the 2008 and the 2014 Basque and Catalan referendums were unconstitutional in light of the aforementioned principles (sentences 103/2008, 31/2015, 32/2015 and 138/2015).

That being said, denying a people a certain way of exercising a right does not entail that this right does not exist in and of itself. Hence, the core question is not whether the Spanish Constitution allows the Catalan people to exercise their right to decide through a referendum, but rather whether the Catalan people is vested with such a right.

Searching for the Catalan people’s right to decide in the text of the Spanish Constitution would prove to be a vain exercise. Yet, it is generally accepted that the right to decide in domestic law can be intrinsic to and inseparable from the democratic principle (Barceló 2014). As such, not only does the Spanish Constitution provide that Spain be a democratic State (article 1), but its preamble explicitly declares that the Constitution guarantees democracy. Hence, if the right to decide is to be drawn from the democratic principle, the Spanish Constitution appears to be an ideal breeding-ground for such a right to take root.

This was indeed acknowledged by the Spanish Constitutional Tribunal in 2014 (Sentence 42/2014). Although the

Court declared the unconstitutionality of the Catalan *Declaration of Sovereignty*, it acknowledged that the “right to decide” was protected by the freedom of expression and the right to participate in political issues. That being said, the Court noted that this right to decide is not limitless and is to be employed within the boundaries set out in the Spanish Constitution: this right represents “a political aspiration which is reached by means of a process which comes to terms with the constitutional legality.” Therefore, the Court opined that the right to decide allows Catalonia to “prepare,” “defend” and “achieve” its independence from Spain, provided that this process be made in accordance with the applicable constitutional reform framework. However, the Court held that, in light of the central government’s exclusive jurisdiction over the holding of referendums, “in the constitutional framework, an autonomous community cannot unilaterally convoke a referendum of self-determination to decide on their integration in Spain.”

In 2014, Barcelona sought to avoid this referendum dead-end by organizing a citizen participation process on the basis of its jurisdiction over popular consultations (2006 Statute of Autonomy, article 122). Once again, this process was challenged by the Spanish State before its Constitutional Tribunal, which ruled that popular consultations cannot relate to any subject matters that require that the Spanish Constitution be reformed (Sentence 138/2015). Indeed, the Court opined that the holding of popular consultations on such topics would amount to bypassing the Spanish Constitution, which provides for strict and predefined procedures for an amendment to be made. As such, the secession of Catalonia from Spain would clearly require that the Spanish Constitution be amended, therefore making it unconstitutional to hold a popular consultation on this topic.

This reasoning results in an intrinsic incoherence. On one hand, the democratic principle and the right to participate in political issues enshrined in the Spanish Constitution grant the Catalan people the right to decide. On the other hand, however, this right to decide cannot be exercised through democratic or participatory means. Squaring the circle thus becomes impossible: if Catalonia were to exercise its constitutional right to decide in order to seek secession from Spain, only political and parliamentary means could be used in order to comply with the Spanish Constitution, and the people could not be consulted prior to such process being launched. Therefore, whereas the right to decide under Spanish law arises from the democratic principle, this principle could not be implemented through the holding of a popular consultation through a referendum.

To sum up, the Spanish Constitution grants an implicit right to decide to the Catalan people. This right, however, is only to be exercised within the Spanish constitutional boundaries that appear to forbid that the Catalan people exercise such right to decide through the means of a referendum. This limitation, however, could be seen as going against the new European common constitutional tradition of independence-referendum acknowledgment, as discussed above.

### **5. The Right To Decide and Catalan Law**

The right to decide has been referred to in many resolutions of the Parliament of Catalonia (Resolutions 5/X (January 20, 2013), 1/XI (November 9, 2015), 263/XI (July 21, 2016) and 306/XI (October 6, 2016)) and has now been integrated into Catalonia’s “current system” of legislation. Such an incorporation occurred when the Parliament of Catalonia adopted the *Proposició de Llei del referèndum d'autodeterminació (Draft Law on the Self-Determination Referendum)* on September 6, 2017.

The Explanatory Memorandum that precedes the text of the Law on the Self-Determination Referendum contains a reference to the International Covenants on Human Rights and to the right of self-determination enshrined therein.

Resolutions adopted by the Catalan Parliament in 1989 and 1998 mentioning the right to self-determination are also mentioned in the explanatory memorandum, which also contains references to the right to democracy, democratic society, democratic public management, democratic mandate, democratic response, democratic representative powers and democratic tool (vote).

The object of the Law on the Self-Determination Referendum is set out in article 1, which states that the law will “govern the holding of a binding referendum on self-determination on the independence of Catalonia [...]” Title II of the Law clearly affirms that “[t]he people of Catalonia is a sovereign political subject and, as such, exercises the right to decide freely and democratically on its political condition” (emphasis added). Article 3 is also of great importance, as it gives an explicit role to Parliament in the implementation of the right to decide, establishes a legal regime for such implementation and enshrines the right to self-determination in the Catalan current legal system. The full text of article 3 reads as follows:

### Article 3

1. The Parliament of Catalonia acts as the representative of the sovereignty of the people of Catalonia.
2. This Law establishes an exceptional legal regime aimed at governing and guaranteeing the self-determination referendum of Catalonia. It has hierarchical prevalence over any other regulations that may come into conflict with it, in that it governs the exercising of a fundamental and inalienable right of the people of Catalonia.
3. All and any authorities, natural or legal persons participating directly or indirectly in the preparation, holding and/or implementation of the result of the referendum shall be covered by this Law, which implements the right to self-determination that is part of the current legal system.

The final provision of the *Law on the Self-Determination Referendum* is also of the utmost importance. In stating that “[t]he provisions of local, autonomous community and Spanish State law in force in Catalonia at the time of the passing of this Law shall continue to be applicable in every regard that does not contravene it,” the Catalan Parliament is creating a new Catalan constitutional order having precedence over the Spanish constitutional order. Such precedence is particularly significant in relation with the right to decide, inasmuch as the right enacted under Catalan law will be implemented through the means freely determined by the Catalan Parliament rather than by those envisaged by the Spanish Constitution. As it happened with the 2014 referendum declarations, resolutions and laws passed by the Catalan Government, it is highly likely that the Spanish Government will ask the Spanish Constitutional Tribunal to declare the *Draft Law* unconstitutional as soon as it is enacted. Should this be the case, the Catalan government might then invoke article 13 of the *Draft Law* to contend that the Spanish Constitution has ceased to be in force in Catalonia, as it contravenes its *Law of the Self-Determination Referendum*.

Other provisions of this *Law on the Self-Determination Referendum* pertaining to the referendum question, franchise, voting and Electoral Commission have been carefully analyzed and commented in Matt Qvortrup’s paper, which can be found in the present report.

<sup>3</sup> The English translation of the full text can be read online: [http://exteriors.gencat.cat/web/.content/00\\_ACTUALITAT/notes\\_context/Self-Determination-Referendum-bill.pdf](http://exteriors.gencat.cat/web/.content/00_ACTUALITAT/notes_context/Self-Determination-Referendum-bill.pdf) (accessed August 31, 2017) and is reprinted in the annex of the present report, p. 75. See on this Draft Law José Luis Martí, “The Catalan Self-Determination Referendum Draft Bill: A New Form of Transitional Constitutional Regime,” *Verfassungsblog*, July 18, 2017, and the comments following the article online: <http://verfassungsblog.de/the-catalan-self-determination-referendum-draft-bill-a-new-form-of-transitional-constitutional-regime> (accessed August 24, 2017).

## 6. *The Right To Decide and Comparative Law*

The right to decide is not foreign to several constitutions that explicitly recognized in constituent units of a country the right to decide. The former Constitutions of the USSR, of Yugoslavia and of Serbia-and-Montenegro guaranteed this right. The existence of such a general right to self-determination or a more specific right of secession was relied upon by the peoples of these former republics in the processes that led to their independence and eventually to the dissolution of these federal states.

Today, there are at least three constitutions that clearly consecrate the right to decide. In its article 39, the Constitution of Ethiopia provides in its first paragraph that “[e]very Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.” The Constitution of the Federation of Saint Christopher and Nevis also comprises a right to decide and is much more precise on the modalities required for this right to be exercised. Section 113 reads as follows:

**113.** (1) The Nevis Island Legislature may provide that the island of Nevis shall cease to be federated with the island of Saint Christopher and accordingly that this Constitution shall no longer have effect in the island of Nevis.

(2) A bill for the purposes of subsection (1) shall not be regarded as being passed by the Assembly unless on its final reading the bill is supported by the votes of not less than two-thirds of all the elected member of the Assembly and such a bill shall not be submitted to the Governor-General for his assent unless-

a) there has been an interval of not less than ninety days between the introduction of the bill in the Assembly and the beginning of the proceedings in the Assembly on the second reading of the bill,

b) after it has been passed by the Assembly, the bill has been approved in a referendum held in the island of Nevis by not less than two-thirds of all the votes validly cast on that referendum; and

c) full and detailed proposals for the future constitution of the island of Nevis (whether as a separate state or as part of or in association with some other country) have been laid before the Assembly for at least six months before the holding of the referendum and those proposals, with adequate explanations of their significance, have been made available to the persons entitled to vote on the referendum at least ninety days before the holding of the referendum.

(3) Every person who, at the time when the referendum is held, would be entitled to vote at elections of representatives held in the island of Nevis shall be entitled to vote on a referendum held for the purposes of this section in accordance with such procedure as may be prescribed by the Nevis Island Legislature for the purpose of the referendum and no other person shall be entitled so to vote.

(4) In any referendum for the purposes of this section the votes shall be given by ballot in such manner as not to disclose how any particular person votes.

(5) The conduct of any referendum for the purposes of this section shall be the responsibility of the Supervisor of Elections and the Provisions of subsection (4), (5) and (7) of section 34 shall apply in relation to the exercise by the Supervisor of Elections or by any other officer of his function with respect to a referendum as they apply in relation to the exercise of his functions with respect to elections of Representatives.

(6) There shall be such provisions as may be made by the Nevis Island Legislature to enable independent and impartial persons nominated by an international authority to observe the conduct of a referendum for the purposes of this section and to make reports on the conduct or results of the

referendum to the Governor-General, who shall cause any such reports to be published, and for that purpose any such persons shall be accorded such powers, privileges and immunities as may be prescribed by or under any a law enacted by Parliament or, subject thereto, by or under any law enacted by the Nevis Island Legislature.

It is interesting to note the Nevis Administration relied upon section 113 and adopted a *Secession Bill* in 1997. A referendum was held in 1998, but the two-thirds majority threshold provided in article 113 (2) b) was not reached, with 61.7 percent voting in favour of independence.

A less-known constitutional recognition of the right to decide is to be found in Liechtenstein. In its article 4(2), the Constitution of the Principality provides all communes with a right to decide and to do so on the following terms:

Individual communes have the right to secede from the State. A decision to initiate the secession procedure shall be taken by a majority of the citizens residing there who are entitled to vote. Secession shall be regulated by a law or, as the case may be, a treaty. In the latter event, a second ballot shall be held in the commune after the negotiations have been completed.

In some recent cases, the recognition of the right to decide has taken nonconstitutional routes. Indeed, the decision of the people of Southern Sudan to become independent in 2011 found its basis in the 2005 *Comprehensive Peace Agreement* between Soudan and the Sudan People's Liberation Army (the Naivasha Agreement). Despite the fact that this case may be seen as one of decolonization, the *Nouméa Agreement* will be the legal basis for the November 2018 referendum in New Caledonia. Finally, a peace agreement that ended a decade-long armed conflict was reached between Papua New Guinea and the autonomous region of Bougainville, and will ultimately lead to the organization of an independence referendum in 2019.

The case of Québec is of particular interest when discussing the right to decide in comparative law, in light of the Supreme Court of Canada's landmark advisory opinion in its *Québec Secession Reference*, but also when reading Canada's *Clarity Act* and *Québec's Fundamental Rights Act*. The resonance of these legal documents is not unrelated to the fact that the democratic principle has proven to be the legal basis on which the *Québec Secession Reference* recognized Québec's right to pursue secession and affirmed Canada's corollary obligation to negotiate constitutional changes as a response to Québec's desire of independence.

The democratic principle has gained significant importance in the debate on the existence and scope of the right to self-determination in Québec. The referendums of May 20, 1980, and October 30, 1995, were seen as processes of determining the political status of Québec based on the democratic principle and on a right to independence that had found its sources therein (Turp 2001). If some doubted, or even objected to this basis, the Supreme Court of Canada put an end to such a doubt in its *Québec Secession Reference* and enshrined a "right to pursue secession" by resorting to this principle.

In reaching this conclusion, the Supreme Court of Canada devoted significant developments to the notion of democracy and further defined the democratic principle. In their unanimous opinion, the nine justices of Canada's highest court referred to democracy as "a fundamental value in our constitutional law and political culture" (§ 61). They then presented the "principle of democracy" in the following terms:

The principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day. A majority of this Court in *OPSEU*



*v. Ontario, supra*, at p. 57, confirmed that “the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels”. As is apparent from an earlier line of decisions emanating from this Court, [...], the democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the *Constitution Act, 1867* itself. To have done so might have appeared redundant, even silly, to the framers. As explained in the *Provincial Judges Reference, supra*, at para. 100, it is evident that our Constitution contemplates that Canada shall be a constitutional democracy. Yet this merely demonstrates the importance of underlying constitutional principles that are nowhere explicitly described in our constitutional texts. The representative and democratic nature of our political institutions was simply assumed. (§ 62)

Returning to democracy and its meaning, the Court added:

Democracy is commonly understood as being a political system of majority rule. It is essential to be clear what this means. The evolution of our democratic tradition can be traced back to the *Magna Carta* (1215) and before, through the long struggle for Parliamentary supremacy which culminated in the English *Bill of Rights* of 1689, the emergence of representative political institutions in the colonial era, the development of responsible government in the 19th century, and eventually, the achievement of Confederation itself in 1867. “[T]he Canadian tradition”, the majority of this Court held in *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 186, is “one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation”. Since Confederation, efforts to extend the franchise to those unjustly excluded from participation in our political system — such as women, minorities, and aboriginal peoples — have continued, with some success, to the present day. (§ 63)

The Supreme Court of Canada then made it clear that democracy also had a collective dimension. Hence, the following statement referring to key notions such as “self-government,” “sovereign people” and “groups” are of particular interest:

[D]emocracy is fundamentally connected to substantive goals, most importantly, the promotion of *self-government*. Democracy accommodates *cultural and group identities*: *Reference re Provincial Electoral Boundaries*, at p. 188. Put another way, a sovereign people exercises *its right to self-government through the democratic process*. In considering the scope and purpose of the *Charter*, the Court in *R. v. Oakes*, [1986] 1 S.C.R. 103, articulated some of the values inherent in the notion of democracy (at p. 136):

The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for *cultural and group identity*, and faith in social and political institutions which enhance the participation of individuals *and groups* in society. (§ 64)

Other key concepts were called upon by the Court when discussing the meaning and content of democracy, concepts such as the “consent of the governed,” the “rule of law,” “legitimacy” and the “aspirations of the people.” Again, the opinion of the Court deserves to be quoted at length:

The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the “sovereign will” is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions

created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. *The system must be capable of reflecting the aspirations of the people [...].* (§ 67)

Referring to the [Canada's] *Constitution Act, 1982*, which, according to the Court, "gives expression" to the democratic principle, the learned justices suggested this Act not only confers "a right to initiate constitutional change on each participant in Confederation," but also imposes "a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces" (§ 69). "This duty," adds the Court, "is inherent in the democratic principle which is a fundamental predicate of our system of governance" (§ 69). In addition, and once more referring to the democratic principle, the Supreme Court of Canada measured the weight that should be given to a clear expression of the will people of Québec to secede from Canada expressed through a referendum. After stating that "[o]ur political institutions are premised on the democratic principle, and so an expression of the democratic will of the people of a province carries weight" (§ 87), the Court made its most daring affirmation in acknowledging Québec's "right" to pursue secession:

The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the *principles of democracy* and federalism. The rights of other provinces and the federal government cannot deny the *right of the government of Québec to pursue secession*, should a clear majority of the people of Québec choose that goal, so long as in doing so, Québec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Québec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec (§ 90, emphasis added)

Hence, in an opinion that was acclaimed by many in Québec and which is now well known in Catalonia, the Supreme Court of Canada held that there exists a constitutional right for Québec to pursue secession, as well as a corollary obligation for Canada to negotiate the secession of Québec.

Obviously, Ottawa had not foreseen that the *Québec Secession Reference* would lead to recognition of the existence of such a right and obligation. Hence, the federal Parliament replied with the *Act To Give Effect to the Requirement of Clarity as Set Out in the Opinion of the Supreme Court of Canada in the Québec Secession Reference*. This *Clarity Act* was seen as an attempt to neutralize the Supreme Court of Canada's affirmation of Québec's right to pursue secession and Canada's obligation to negotiate the secession of Québec.<sup>4</sup> Indeed, while the Supreme Court held that a clear majority on a clear question would impose on the Rest of Canada an obligation to negotiate Québec's independence, *Canada's Clarity Act* obviously tries to avoid this obligation in providing that "[t]he Government of Canada shall not enter into negotiations on the terms on which a province might cease to be part of Canada if the House of Commons

<sup>4</sup> Many analyses were made with regards to the noncompliance of Canada's Clarity Act in light of the Supreme Court's findings in the Québec Secession Reference. Among others, see Stephen Tierney, *Constitutional Referendums: A Theory and Practice of Republican Deliberation* (Oxford University Press, 2014), 318; Patrick Taillon, "De la clarté à l'arbitraire : le contrôle de la question et des résultats référendaires par le Parlement canadien," *Revisa d'Estudis Autonòmics i Federals* 2014, no. 20 (2014): 14; and José Woehrling, "Les aspects juridiques de la redéfinition du statut politique et constitutionnel du Québec," in Québec, Ministère du Conseil exécutif (Bureau de coordination des études), *La mise à jour des études originalement préparées pour la Commission sur l'avenir politique et constitutionnel du Québec (1990-1991) et pour la Commission parlementaire d'étude des questions afférentes à l'accession du Québec à la souveraineté (1991-1992)*, vol. 2 (Ministère du Conseil exécutif, 2002).

determines [...] that a referendum question is not clear” (section 1(6)). In declaring that only the federal Parliament could decide whether or not negotiations pertaining to the secession of Québec would take place, Ottawa clearly violated the spirit of the *Québec Secession Reference*<sup>4</sup>. Indeed, the Supreme Court emphasized that the issue of what constitutes a “clear question”—a prerequisite for such negotiations to be triggered—was to be ruled upon by *all* political actors involved in the process of Québec’s secession from Canada, and not by a single, centralized Parliament (Beauséjour, forthcoming).

However, Québec did not accept that Ottawa alone set the rules of its potential secession and replied with its very own statute. As it always did in the past, Québec relied on its right to self-determination to support the right of its people to decide its future and to opt, if such was the will of the people, for political independence. Thus, the National Assembly enacted the *Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State*. Articles 1 to 5 and 13 of *Québec’s Fundamental Rights Act* are worth quoting at length:

**1.** The right of the Québec people to self-determination is founded in fact and in law. The Québec people is the holder of rights that are universally recognized under the principle of equal rights and self-determination of peoples.

**2.** The Québec people has the inalienable right to freely decide the political regime and legal status of Québec.

**3.** The Québec people, acting through its own political institutions, shall determine alone the mode of exercise of its right to choose the political regime and legal status of Québec.

No condition or mode of exercise of that right, in particular the consultation of the Québec people by way of a referendum, shall have effect unless determined in accordance with the first paragraph.

**4.** When the Québec people is consulted by way of a referendum under the Referendum Act (chapter C-64.1), the winning option is the option that obtains a majority of the valid votes cast, namely 50% of the valid votes cast plus one. [...]

**5.** The Québec State derives its legitimacy from the will of the people inhabiting its territory.

The will of the people is expressed through the election of Members to the National Assembly by universal suffrage, by secret ballot under the one person, one vote system pursuant to the Election Act (chapter E-3.3), and through referendums held pursuant to the Referendum Act (chapter C-64.1).

Qualification as an elector is governed by the provisions of the Election Act

**13.** No other parliament or government may reduce the powers, authority, sovereignty or legitimacy of the National Assembly, or impose constraint on the democratic will of the Québec people to determine its own future.

Indeed, one of the dominant features of *Québec’s Fundamental Rights Act* is its unequivocal affirmation of the existence of the Québec people. In its articles 1 and 2, it declares the existence of a Québec people, a statement that no Québec legislation had ever done before. This affirmation was necessitated by Canada’s refusal to recognize the existence of the people of Québec. In stating that the people of Québec actually exists, *Québec’s Fundamental Rights Act* creates an international legal subject and provides it with the right to self-determination and the right to choose, as set out in sections 2 and 3. As opposed to the *Clarity Act*, which provides for no predetermined victory threshold, section 4 of *Québec’s Fundamental Rights Act* sets out that “when the Québec people is consulted by way of a referendum under the Referendum Act, the winning option is the option that obtains a majority of the valid votes cast, namely fifty percent of the valid votes cast plus one.”

Section 5 of *Québec’s Fundamental Rights Act* also provides that the Québec State derives its legitimacy from the will of the people inhabiting its territory and contains an affirmation fully consistent with the third paragraph of article 21 of the *Universal Declaration of Human Rights*, which provides that “the will of the people shall be the basis of the

authority of government.” In section 5 of *Québec’s Fundamental Rights Act*, the reference to the fact that the will of the people is expressed through the election of members to the National Assembly by universal suffrage, by secret ballot, under the one-person, one-vote system, in accordance with the Québec *Election Act* and through referendums held pursuant to the *Referendum Act*, is also consistent with the requirements of the *Universal Declaration of Human Rights*. In providing that “no other parliament or government may reduce the powers, authority, sovereignty or legitimacy of the National Assembly, or impose constraint on the democratic will of the Québec people to determine its own future,” section 13 is designed to nullify any effect of Canada’s *Clarity Act* in Québec. It must be seen as a stand taken against any power that this Act might give the House of Commons to decide on the clarity of a measure of the National Assembly and specifically on the clarity of a question adopted by a motion of the National Assembly. It also nullifies the effect of any measure taken by the House of Commons to determine the clarity of the question or results of a referendum held in Québec.

Québec has thus continued a process of legal empowerment in affirming its right to self-determination as well as its right to decide on the basis of the democratic principle put forward the Supreme Court of Canada.

## 7. Conclusion

Throughout its history, Catalonia has attempted to preserve its distinct identity through democratic means—including referendums—to master its own future. It is now at the crossroads as it engages itself in a legal, political and social struggle concerning its right to decide.

In such a struggle, Catalonia has so far mostly relied on the right to decide now enshrined in its *Law on the Referendum on Self-determination* and on the new Catalan constitutional order that has emerged therefrom. That being said, Catalonia also holds a right to decide founded in international law, and notably on the *International Covenants on Human Rights*, since Catalonia is included among “all peoples” who can “freely determine their political status and freely determine their economic, social and cultural development.”

As we have seen, the most recent developments in European law might not be an obstacle to an accession of Catalonia to independence, and a common constitutional tradition could in fact push the European Union and its bodies to recognize the upcoming Catalan referendum. This common constitutional tradition, coupled with the right to decide recognized by the Spanish Constitutional Court, could ultimately legitimize both the Catalans’ claim to a right to decide and to hold a referendum on their independence.

Catalonia has all reasons and legal legitimacy to remind not only its Spanish interlocutors, but also other countries and its own people that several countries have chosen to respect the democratic will of their peoples and accept to allow the democratic principle to be fully implemented in the peoples’ pursuit of freedom. Québec and Scotland are two examples where the democratic principle has prevailed, but there are more to come in many different parts of the world. In leading the battle on the issue of the right to decide, Catalonia is empowering itself and, in doing so, inspiring many other peoples of the international community of peoples as a whole.

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# CONCLUSION

This report has addressed different aspects of the process of self-determination that is underway in Catalonia, as well as the proposed referendum to be held on 1 October, 2017. It has attempted to examine the issues from different scientific perspectives, be they historical, sociological, political or legal.

In part one, Professor Yanina Welp analyzed and presented a historical and sociological perspective on the evolution of the Catalan support for—or rejection of—independence. According to Professor Welp, such support or rejection of these options is not equally distributed, a fact that is underpinned by three main political tendencies—namely, a legitimate claim for more self-government, a strong Catalan social reaction against the limits imposed by the Spanish Constitutional Tribunal in its 2010 decision relating to the Statute of Autonomy of Catalonia and the opening of an unilateral process of “disconnection” (*desconnexió*) in 2016. This unilateral process has redefined preferences and introduced an incredible level of divisiveness between different options.

Professor Nina Caspersen, in part two, presented the political context of Catalonia’s claim for self-determination and its demand for independence, and drew up a number of future scenarios, depending on the outcome of the referendum. Professor Caspersen argued that Madrid’s refusal to recognize the legality of the referendum has had a crucial impact on both domestic dynamics and international responses, which makes the Catalan referendum quite different from the recent Scottish one. Turnout in the referendum is likely to prove crucial, not only for the outcome of the referendum, but also for the subsequent domestic and international responses. Although international recognition is ultimately a political decision that is hard to predict, a unilateral declaration of independence is unlikely to be widely recognized by foreign states. In such a scenario, international non-recognition would come at a cost. The exact cost would significantly depend on the Spanish Government’s position, although it is likely to be reduced by Catalonia’s existing international ties.

In part three, Professor Matt Qvortrup analyzed the timing of when referendums are held and the factors determining their outcome, as well as the legislation governing the conduct of these referendums. He recalls that referendums on independence have come in waves and only became common after the fall of the Soviet Union. Most referendums have been held in countries with relatively weak democratic institutions. In the few independence referendums that were held in democratic countries, secessionist governments tended to win when they had taken office not long before the referendum, and only when the referendum campaign was preceded by a broad support for independence. In his assessment of the draft *Law of the Self-Determination Referendum* presented to the Catalan Parliament on July 31st, 2017, Professor Qvortrup concluded, with some reservations, that the current legislation meets international standards.

Professor Daniel Turp analyzed, in part four, Catalonia’s right to decide, which is set forth as the legal basis for Catalonia’s quest for self-determination. He examined this right in light of the rules set out in international, European, Spanish, Catalan and comparative law. Acknowledging that divergent opinions have been expressed on Catalonia and other non-colonial peoples’ right to establish independent states based on the right of self-determination, Professor Turp opined that such a right can notably find its legal foundation in the *International Covenants on Human Rights*. A strong argument in favour of Catalonia’s right to decide has been found in the most recent developments in European law, which seems to have developed a common constitutional tradition of acknowledging the results of independence referendums. After examining the Spanish Constitution and Catalonia’s draft *Law of the Self-determination Referendum*, Turp also looked into the issue of the right to self-determination from a comparative-law per-

spective, the most eloquent jurisprudence being the Supreme Court of Canada's *Québec Secession Reference*, which held that the right to decide could be grounded in the democratic principle.

In 1917, self-determination became a catchword in international politics in light of the views expressed by President of the United States of America Woodrow Wilson: "No peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property." One hundred years later, in 2017, self-determination has obviously not lost its relevance for peoples who, like the Catalans, endeavour to hold independence referendums and invoke their right to decide on the basis of the right to self-determination, as well as the democratic principle.

# ANNEX— THE LAW ON THE SELF-DETERMINATION REFERENDUM (PROJECT)

## EXPLANATORY MEMORANDUM

The International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, approved by the United Nations General Assembly on 19 December 1966, ratified and in force in the Kingdom of Spain since 1977—published in Spain's Official Gazette, the BOE, on 30 April 1977—recognise the right of all peoples to self-determination as the first human right. The Spanish Constitution of 1978 establishes, in Article 96, that international treaties ratified by Spain form part of its domestic legislation and, in Article 10.2, establishes that the rules on fundamental rights and public freedoms shall be interpreted in accordance with applicable international treaties on the matter.

The Parliament of Catalonia has continuously and unambiguously expressed Catalonia's right to self-determination. This was manifested in Resolution 98/III, on the Catalan nation's right to self-determination, adopted on 12 December 1989, and ratified in Resolution 679/V, adopted on 1 October 1998, in Resolution 631/VIII of the Parliament of Catalonia, on the right to self-determination and on the recognition of public referenda on independence, adopted on 10 March 2010. More recently, Resolution 5/X of the Parliament of Catalonia, which approved the Declaration of Sovereignty and the right to decide of the people of Catalonia and Resolution 306/XI, adopted on 6 October 2016, on the general political orientation of the Government of Catalonia, have asserted Catalonia's inalienable and indefeasible right to self-determination and have confirmed a parliamentary majority in favour of independence.

In parallel, Resolution 1999/57, on the Promotion of the right to democracy, of the United Nations Commission on Human Rights, proclaimed the indissoluble links between the principles enshrined in the Universal Declaration of Human Rights and the foundation of any democratic society. Within this context, democratic management of public affairs has been internationally accepted as one of the cornerstones of contemporary society and has been inextricably linked to, amongst other rights, that of citizens' direct and indirect political participation and to the right to freedom and to human dignity, including freedom of expression and opinion, freedom of thought and freedom of association, rights recognised in the principal universal and European treaties on the protection of human rights. They therefore assert that the democratic management of any political discrepancy must take place with full respect for these fundamental human rights and freedoms.

In recent opinions, the International Court of Justice has stated that, during the second half of the 20th century, there have been cases of new states that have exercised the right to self-determination without the exercise of this right to decide being motivated by the end of imperialism. The Court notes that the right of peoples to decide has evolved, and that, to counter this evolution, no new rule or custom has arisen at an international level to prohibit these new practices. The only limitation on the right to decide that the Court regards as enforceable is the unlawful resorting to force or other serious violations of the rules of international law.

The passing of this Law is, then, the ultimate expression of the democratic mandate arising from the elections of 27 September 2015, in which, in the decision taken by the Parliament of Catalonia to culminate the process with the calling of the self-determination referendum, there is a confluence of the historical legitimacy and legal and institutional tradition of the Catalan people—interrupted, over the course of the centuries, only by force of arms—and the right of peoples to self-determination, enshrined in international legislation and jurisprudence and the principles of popular sovereignty and respect for human rights, as the basis for all legal systems.

The act of sovereignty entailed in the passing of this Law is the option necessary to be able to exercise the right of

the Catalans to decide on the political future of Catalonia, particularly following the breaking of the Spanish constitutional pact of 1978 caused in 2006 by the partial revocation and complete denaturing of the Statute of Autonomy of Catalonia—approved by the Parliament of Catalonia and endorsed by the people of Catalonia—by means of Ruling 31/2010 of Spain's Constitutional Court. This Law represents the democratic response to the frustration created by the final attempt, advocated by a very broad majority of this Parliament, to guarantee for the people of Catalonia full recognition, representation and participation in the political, social, economic and cultural life of the Spanish state without any form of discrimination.

In the previous process, every effort was made to find an agreed way for the people of Catalonia to freely decide upon its future. The Parliament, given the majority mandate from the people of Catalonia, assumes full sovereign representation of its citizens, after exhausting all forms of dialogue and negotiation with the Spanish State.

In taking the momentous decision to pass this Law, the Parliament of Catalonia is expressing the majority will of the people, from whom its powers stem, making use of its legal and democratic representative powers to place in the hands of the men and women of Catalonia the decision on the political future of the country, by means the most radically democratic tool in our possession: the vote.

## **TITLE I**

### **Object**

#### **Article 1**

This Law governs the holding of a binding self-determination referendum on the independence of Catalonia, whose consequences shall depend upon the given result, and the creation of the Electoral Commission of Catalonia.

## **TITLE II**

### **On the sovereignty of Catalonia and its Parliament**

#### **Article 2**

The people of Catalonia are a sovereign political subject and, as such, exercise their right to freely and democratically decide upon their political condition.

#### **Article 3**

1. The Parliament of Catalonia acts as the representative of the sovereignty of the people of Catalonia.
2. This Law establishes an exceptional legal regime aimed at governing and guaranteeing the self-determination referendum of Catalonia. It has hierarchical prevalence over any other regulations that may come into conflict with it, in that it governs the exercising of a fundamental and inalienable right of the people of Catalonia.
3. All and any authorities, natural or legal persons participating directly or indirectly in the preparation, holding

and/or implementation of the result of the referendum shall be covered by this Law, which implements the right to self-determination that is part of the current legal system.

### **TITLE III**

#### **On the self-determination referendum**

##### **Article 4**

1. The citizens of Catalonia are called upon to decide on the political future of Catalonia by means of the holding of the referendum, the terms of which are detailed below.

2. The question to be asked in the referendum is:

*'Do you want Catalonia to be an independent state in the form of a republic?'*

3. The result of the referendum shall be binding in nature.

4. If the count of votes validly cast gives a result of more affirmative than negative votes, this shall mean the independence of Catalonia. To this end, the Parliament of Catalonia shall, within two days of the proclamation of the results by the Electoral Commission, hold an ordinary session to issue the formal declaration of independence of Catalonia and its effects and resolve upon the commencement of the constituent process.

5. If the counting of votes validly made gives a result of more negative than affirmative votes, it shall mean the immediate calling of elections for the Autonomous Community of Catalonia.

##### **Article 5**

1. Voting shall be direct, personal, free, secret, equal and universal.

2. The scope of the referendum is the entire territory of Catalonia.

##### **Article 6**

1. All those persons with the right to vote in the elections to the Parliament of Catalonia shall be able to vote. Those Catalans resident abroad whose most recent registration to vote was in Catalonia shall also be entitled to vote, provided that they comply with the legally stipulated requirements and have formally requested to take part in the vote.

2. Those declared incompetent or sentenced by final legal judgement to the principal or accessory penalty of privation of voting rights may not exercise the right to vote.

##### **Article 7**

1. The ballot papers shall contain the question established in Article 4.2. The question shall be worded in Catalan and Spanish, and also in Occitan in the territory of Aran.

2. There shall be a specimen ballot paper: a ballot paper with the question and the words 'Sí' and 'No' ('Yes' and 'No') in boxes.

3. Ballot papers shall be prepared for persons with visual impairment. In the absence of such papers, the Chair of the polling station committee or person of trust chosen by the visually impaired voter shall assist in taking the necessary steps to vote.

### **Article 8**

1. The vote may be affirmative (Sí/[Yes]), negative (No), depending upon the option marked by the voter, or blank if neither of the two options is chosen.

2. Any vote that does not fit the official form, or that contains amendments, nuances or any other contingency that raises doubts as to the sense of the vote shall be deemed null.

3. If one envelope contains more than one ballot paper, it shall be deemed a single vote, provided that all the papers show the same choice. If the papers conflict, the vote shall be deemed null.

4. If an envelope contains no ballot paper or a paper with no option chosen, it shall be regarded as a blank vote.

## **TITLE IV**

### **On the date and calling of the referendum**

#### **Article 9**

1. The referendum shall be held on Sunday 1 October 2017, pursuant to the Decree on the Calling of the Referendum to be signed subsequent to the entry into force of this Law.

2. The Government of Catalonia shall also issue a Decree of Complementary Regulations, which shall govern, at least, the official template for the ballot paper, the official template for the ballot envelope, for the electoral records and the remaining official material required for the holding of the self-determination referendum, the voting methods and procedures, the start date and duration of the election campaign, the electoral administration responsible, the provision of the necessary human and material resources, the procedure for accrediting the status of stakeholder organisations and the conditions and guarantees, as the case may be, for postal votes, as well as any remaining regulations that may be necessary.

#### **Article 10**

The Catalan public administrations must remain neutral in the electoral campaign and refrain from using their budgetary resources to favour any of the options in the referendum campaign.

#### **Article 11**

1. Political formations with representation in the Parliament of Catalonia have the right to use 70% of the public spaces set aside for the campaign, between whom it shall be allocated in proportion to the number of parliamentary seats obtained in the most recent elections to the Parliament of Catalonia. The remaining 30% of the space



shall be allocated amongst the accredited stakeholder organisations, in accordance with the number of signatures submitted.

2. Political formations with parliamentary representation have the right to use 70% of the free public information spaces in the publicly owned media. The electoral administration shall allocate the use of the space between the political formations with representation in the Parliament of Catalonia in accordance with the results obtained in the most recent elections to Parliament. The remaining 30% shall be allocated amongst the accredited stakeholder organisations, in accordance with the number of signatures submitted.

### **Article 12**

1. During the campaign, media outlets that are publicly owned or the majority of whose funding is public must guarantee the principles of political and social pluralism, editorial neutrality and equality of opportunity. These media outlets may neither express nor show support for any of the options to be chosen.

2. During the electoral period, privately owned media outlets must respect the principles of political and social pluralism, equality of opportunity, and of editorial proportionality and neutrality in electoral debates and interviews. These media outlets may express or show support for an option, provided that they respect the aforementioned principles and that they treat the opposing option equitably and reasonably.

3. The Electoral Commission of Catalonia shall guarantee compliance with these principles. It shall issue the instructions it deems necessary and resolve complaints in accordance with the procedures it itself establishes. In the case of non-compliance, it may adopt compensatory measures to re-establish balance between the two options which are the subject of the referendum.

## **TITLE V**

### **On the referendum guarantees**

### **Article 13**

1. The electoral administration governed in Title VI of this Law shall ensure that the referendum is carried out pursuant to this Law, its implementing regulation and the international provisions and documents on the matter.

2. For the purposes of the referendum, the electoral commissions and polling station committees are independent bodies and do not follow the instructions, orders or resolutions of any other body, except for those addressed by the electoral administration and the electoral commissions to the polling station committees, and those of the Electoral Commission of Catalonia addressed to the regional electoral commissions.

### **Article 14**

1. Political parties, federations and coalitions with parliamentary representation may designate electoral representatives and observers in the electoral regions in which they have obtained representation.

2. Those social organisations interested in taking part in the referendum process may submit an application before

the Electoral Commission of Catalonia between the second and fifth day following the passing of this Law.

3. Regional electoral committees shall accredit the electoral representatives and observers, who may not exceed, for each polling station, the number of two observers from each political party, federation, coalition or stakeholder organisation.

4. Electoral representatives and observers may only cast their vote in the polling station assigned to them according to the electoral register.

### **Article 15**

1. The Government of Catalonia and its electoral administration encourage the presence of international election monitors. To this end, they invite international organisations and monitors qualified in this type of task.

2. The Electoral Commission of Catalonia shall accredit international monitors and shall ensure the unfettered carrying out of their activities.

3. Accredited international electoral monitors may freely attend all processes associated with the holding of the referendum, including the draws for members of polling station committees, the preparation for the opening of polling stations, the voting process, the provisional count at polling stations and the official count at the headquarters of the Electoral Commission of Catalonia, the announcement of the results and the public appearances of the electoral authorities.

4. Accredited international election monitors may address queries, observations and recommendations to the Electoral Commission of Catalonia.

## **TITLE VI**

### **On the electoral administration**

### **Article 16**

The electoral administration is made up of the Electoral Commission of Catalonia, the regional electoral commissions, the district and polling station committees and the Government of Catalonia.

### **Section I: The Electoral Commission of Catalonia**

### **Article 17**

1. The Electoral Commission of Catalonia is established as an independent, impartial and permanent body reporting to the Parliament of Catalonia.

2. The Electoral Commission of Catalonia, with powers throughout the territory of Catalonia, is the body responsible for guaranteeing the transparency and objectivity of the electoral process and the effective exercise of electoral rights.

3. The Electoral Commission of Catalonia has its institutional headquarters in the Parliament of Catalonia, without prejudice to its abilities to meet at other locations.

### **Article 18**

With regard to the referendum, the Electoral Commission of Catalonia shall have the following powers:

- i. To appoint the members of the regional electoral commissions and to appoint their Chairs and Secretaries.
- ii. To validate the electoral register, whose preparation is the responsibility of the electoral administration of the Government of Catalonia.
- iii. To validate the process of updating the electoral map of Catalonia, the preparation of which is the responsibility of the electoral administration of the Government of Catalonia.
- iv. To validate the official templates for ballot papers, ballot envelopes, electoral records, polling station operating manuals, ballot boxes and the remaining official election documentation.
- v. To validate the advance voting procedure for voters resident abroad.
- vi. To coordinate regional electoral commissions and provide guidance on interpretative criteria for their decisions.
- vii. To resolve queries, complaints, claims and appeals in respect of which it has powers.
- viii. To exercise disciplinary jurisdiction over all those persons officially involved in the referendum, correct any of their actions that contravene regulations and penalise, as the case may be, any administrative infringements that do not constitute criminal offences.
- ix. To supervise the institutional campaign for the self-determination referendum and dissemination in the media.
- x. To guarantee the conditions of impartiality and pluralism in public and private media outlets during the electoral campaign.
- xi. To accredit the international election monitors.
- xii. To carry out the general ballot count.
- xiii. To certify the official results and order their publication in the Official Journal of the Government of Catalonia, the *Diari Oficial de la Generalitat de Catalunya*.

### **Article 19**

1. The Electoral Commission of Catalonia is a permanent body made up of five members, either jurists or political scientists, experts in electoral processes, appointed by an absolute majority of the Parliament of Catalonia at the proposal of the parties, federations, coalitions or voter groupings with representation in the Parliament of Catalonia. Whatever the case, the majority of members must be jurists.

2. Status as member of the Electoral Commission of Catalonia is compatible with any other activity in the public or private sector, except for those incompatibilities contemplated in law.

#### **Article 20**

1. The members of the Electoral Commission of Catalonia are irremovable.
2. The members of the Electoral Commission of Catalonia shall choose from amongst themselves those holding the offices of Chair and Secretary to the body.
3. The Chair of the Electoral Commission of Catalonia shall be named the 'Electoral Commissioner'.
4. The Secretary to the Electoral Commission of Catalonia shall be responsible for the keeping of records and for transferring them to the archive network of Catalonia, pursuant to the provisions of Law 10/2001, of 13 July, on archives and records.

#### **Article 21**

All public authorities have, within the scope of their respective powers, the duty to collaborate with the Electoral Commission of Catalonia for the proper carrying out of its duties. It may seek the advice of representatives of the administrations and bodies involved in the electoral process and, in general, of specialists and experts, and may demand that they take part in its meetings, with the right to speak but not to vote.

#### **Article 22**

1. Regional electoral commissions are temporary bodies made up of three members, renowned jurists or political scientists, experts in electoral processes, appointed by the Electoral Commission of Catalonia. Whatever the case, the majority of expert members must be jurists.
2. The Electoral Commission of Catalonia shall appoint from amongst the members the persons who shall perform the duties of Chair of each regional electoral commission, who shall be named the Electoral Commissioner for the relevant electoral region, as well as the member who shall perform the duties of secretary to the regional electoral commission.
3. The headquarters of each regional electoral commission shall be the headquarters of the local office of the Government of Catalonia for the associated electoral region.
4. The mandate of regional electoral commission members concludes with the proclamation of the definitive results. Office as member of a regional electoral commission is compatible with any other activity in the public or private sector, except for those incompatibilities contemplated in law.

#### **Article 23**

With regard to the referendum, within their territorial scope of action, the regional electoral commissions shall have the following powers:

- i. To oversee the transfer by the electoral administration of the electoral packages from the electoral logistic centres to the polling stations.
- ii. To receive information on the availability of public spaces for the placement of electoral advertising and for holding campaign events in the municipalities within their territorial scope of action, and to carry out the assignment thereof to the accredited actors pursuant to common practice.
- iii. Resolve any queries, complaints, claims and appeals forwarded to them.
- iv. To exercise disciplinary jurisdiction over all those persons officially involved in the referendum, correct any of their actions that contravene regulations and penalise, as the case may be, any administrative infringements that do not constitute criminal offences.

#### **Article 24**

- 1. Regional electoral commissions shall be appointed during the second day following the date of appointment of the Electoral Commission of Catalonia and shall be constituted on the second day following the date of appointment of the members.
- 2. Once appointed, the Electoral Commission of Catalonia shall insert a listing of all the members in the following day's Official Journal of the Government of Catalonia.
- 3. Notice of the inaugural meetings of the regional electoral commissions shall be issued by the secretaries, following the indications of the Electoral Commission of Catalonia.

#### **Article 25**

The Government of Catalonia shall make available to the Electoral Commission of Catalonia and to the regional electoral commissions the material and human resources required for the performance of their duties. The payment of temporary remuneration is in all cases compatible with their income and control thereof shall be carried out pursuant to applicable legislation.

#### **Article 26**

- 1. Voters must formulate queries to the regional electoral commissions associated with their place of voting.
- 2. Political parties, federations, coalitions and stakeholder organisations may submit queries to the Electoral Commission of Catalonia when they concern general issues that may affect more than one regional electoral commission. In other cases, queries must be submitted before the relevant regional electoral commission, provided that the scope of competence of the party making the query relates to that jurisdiction.
- 3. Queries shall be made in writing and be resolved by the competent commission, except when, due to the importance of the issue, according to its criteria, or if it deems fit that it be resolved according to a general criterion, it decides to forward it to the Electoral Commission of Catalonia.
- 4. When the urgency of the query does not permit the calling of a meeting of the relevant regional electoral commission, and in all cases in which there are prior concordant resolutions of the relevant regional electoral commission

or of the Electoral Commission of Catalonia, Commissioners may give a provisional response, without prejudice to its ratification or modification at the next meeting of the relevant regional electoral commission.

5. The Electoral Commission of Catalonia shall inform the regional electoral commissions of all the queries it resolves, for the purpose of standardising criteria.

6. The regional electoral commissions must publish in the Official Journal of the Government of Catalonia the resolutions or the content of the queries forwarded, by order of the Chair, when the general nature of the queries make so advisable. In all cases, those issued by the Electoral Commission of Catalonia and those notified to the regional electoral commissions shall be published.

### **Article 27**

Those with subjective rights and legitimate interests may submit complaints, queries or incidents before the relevant regional electoral commission by reason of its territorial scope of action within two days of the facts upon which they are based taking place, becoming known or being made available.

### **Article 28**

1. Those with subjective rights and legitimate interests may lodge an appeal before the Electoral Commission of Catalonia against any resolution of the regional electoral commissions.

2. The appeal must be lodged within two days of the occurrence, knowledge or availability of the originating resolution. It must be resolved as soon as possible, within a period that may not exceed five days. This resolution shall put an end to the making of challenges in all areas.

## **Section III**

### **Electoral districts and polling stations**

### **Article 29**

1. The overall electoral constituency for the referendum is the territory of Catalonia, which is divided into four regions.

2. Each electoral region is divided into electoral districts.

3. Each district includes a maximum of two thousand voters and a minimum of five hundred. Each municipality has at least one district.

4. Each district comprises areas belonging to different municipalities.

5. Each district's voters are arranged alphabetically on the electoral rolls.

6. Each district has a polling station.

7. Nevertheless, when the number of voters in a district or the dispersion of the population makes it advisable to

do so, the electoral administration of the Government of Catalonia may provide for the formation of other polling stations and allocate the district's voters to it. In the former case, the district's electorate shall be allocated by alphabetical order between the stations, which should preferably be located in separate spaces in the same polling place.

8. In selecting the premises for the polling places and the location of the polling stations, applicable provisions concerning architectural barriers must be taken into account.

### **Article 30**

1. The electoral administration of the Government of Catalonia shall establish the limits of the electoral districts, premises and polling station committees for each of the demarcations.

2. Municipal councils shall make available to the electoral administration of the Government of Catalonia the premises to which they have title that are habitually used as polling stations. If they fail to do so, the Administration of the Government of Catalonia may enable alternative premises to guarantee the casting of votes by the voters of the associated constituency.

### **Article 31**

1. Each polling station committee shall be made up of one Chair and two members.

2. Formation of the polling station committee is the responsibility of the electoral administration of the Government of Catalonia, under the supervision of the Electoral Commission of Catalonia.

3. The Chair and members of each committee are chosen by draw from amongst all those on the electoral register in the associated district under the age of sixty.

4. Appointment of two substitutes for each of the members of the committees shall be carried out in the same manner.

### **Article 32**

1. The offices of Chair and member of polling station committees are obligatory.

2. Appointment to the offices of Chair and member of polling station committees must be notified to the interested parties within two days. Together with the notification, committee members shall be provided with an instruction manual on their duties, overseen by the Electoral Commission of Catalonia.

3. Those appointed to the office of Chair or member of polling station committees have a deadline of three days to claim before the relevant regional electoral commission justified and documented cause for preventing them from accepting office. The commission shall resolve upon this claim, with no further recourse, within two days and shall notify, if applicable, the first substitute of the replacement arising.

4. If, subsequently, any of the appointees finds it impossible to be in attendance to carry out their office, he or she must notify the relevant regional electoral commission of the fact at least seventy-two hours in advance of the event to be attended, furnishing due justification thereof. If the impediment arises within this period, the regional electoral



commission must be notified immediately, and in all cases before the time of the constitution of the polling station committee. In these cases, the regional electoral commission shall notify the relevant replacement of the substitution, if there is time to do so, and shall proceed to appoint another, in case this is necessary.

5. If the Chair fails to report for duty, he or she must be replaced in accordance with the following order:

- a) By the first substitute.
- b) If the first substitute is not present, by the second substitute.
- c) If there is no substitute, the first member shall act as Chair, and
- d) If the first member is not present, the second member.

If members do not report to the polling place, or take office as Chair, they shall be replaced by the respective substitutes. If, despite this, it is not possible to constitute the polling station committee, the members present, or if there are none, the representative of the administration, must inform the regional electoral commission of what has happened, by telephone or any other means that enables immediate notification, and must send by recorded delivery a written declaration of what has happened. Should it not be possible to make the aforementioned substitutions, the relevant regional electoral commission shall immediately appoint the persons who shall make up the committee, and may order that the required number of voters present on the premises form part of it, in whatever order they are arranged to cast their vote.

### **Section III**

#### **The electoral administration of the Government of Catalonia**

##### **Article 33**

With regard to the referendum, the electoral administration of the Government of Catalonia shall have the following powers:

- i. To furnish the electoral register and provisional and definitive rolls in accordance with Article 34 hereto.
- ii. To collaborate with the competent Catalan ministry to guarantee the right to vote for Catalans resident abroad.
- iii. To draw up, update and make the relevant changes to the electoral map of Catalonia, defining the districts and the location of polling stations.
- iv. To carry out the draw of members of the polling station committees and notify them personally of the result.
- v. To select, accredit and train those persons carrying out the duties of representatives of the administration and of election officers.
- vi. To design the official templates for electoral documents.

vii. To do everything necessary to guarantee the availability of all the elements required for the casting of votes and the counting of votes cast.

### **Article 34**

1. The electoral register contains the record of people meeting the requirements to be voters and who are not deprived, permanently or temporarily, of their voting rights.

2. The electoral register is made up of voters resident in Catalonia and of voters resident abroad who meet the legally stipulated requirements for exercising the right to vote. No voter may be included on both registers at the same time.

3. Inclusion on the register does not require the prior consent of the citizen in question.

4. The electoral register is arranged by register sections and each voter is recorded in a register section. Nobody may be registered in more than one section or more than once in the same section.

### **Additional provision**

With regard to everything that does not contradict this Law and the Decree of Complementary Rules, Organic Law 2/1980, of 18 January, on the regulations of different forms of referenda, and Organic Law 5/1985, of 19 June, on the general electoral system, shall be applicable on a supplementary basis, interpreted in a manner that is in accordance with this Law.

### **Final provision**

**One.** The provisions of local, autonomous community and Spanish State law in force in Catalonia at the time of the passing of this Law shall continue to be applicable in every regard that does not contravene it. Pursuant to this Law, the provisions of European Union law, general international law and international treaties shall also continue to be applicable.

**Two.** Pursuant to the stipulations of Article 3.2, the provisions of this Law shall cease to be applicable upon proclamation of the referendum results, except for the provisions of Article 4 with regard to the implementation of the result.

### **Entry into force**

This Law shall enter into force on the day of its official publication.

# ABOUT

## THE REPORT OF THE INTERNATIONAL GROUP OF EXPERTS

Geneviève Baril and Frida Osorio Gonsen respectively assumed the supervision and coordination of the Report of the International Group of Experts. Linguistic revision was performed by Xander Selene and proofreading by Frida Osorio Gonsen. Nestor Stratégie was responsible for the coordination and execution of the layout and graphics. Anthony Beauséjour and Daniel Turp were respectively secretary and spokesperson for the International Group of Experts.


**Nina Caspersen** is Professor of Politics at the University of York, UK. Her research is focused on self-determination conflicts, de facto states and international recognition. She is the author of *Contested Nationalism* (Oxford: Berghahn, 2010), *Unrecognized States* (Cambridge: Polity, 2012) and *Peace Agreements* (Cambridge: Polity, 2017), as well as several articles in leading international journals. She holds a PhD in government from the London School of Economics and Political Science.

**Matt Qvortrup** is Professor of Applied Political Science and International Relations at Coventry University. An expert on comparative constitutional engineering and European politics, Professor Qvortrup is the author of the book *Angela Merkel: Europe's Most Influential Leader*, which was described by Kirkus Reviews as "necessary reading for anyone who wants to broaden his or her perspective on the world today." Professor Qvortrup earned his doctorate in politics at Brasenose College, University of Oxford, in 2000. Also a qualified lawyer, he holds a diploma from the College of Law, London.

**Daniel Turp** graduated from the Université de Sherbrooke, the Université de Montréal and the University of Cambridge, and holds a doctorate from the Université de droit, d'économie et de sciences sociales de Paris (Paris II) (*Summa Cum Laude*). He is a full professor at

the Faculty of Law of the Université de Montréal. He has been teaching advanced constitutional law, public international law, and international and constitutional human rights law since 1982. He is also visiting professor at several universities in Quebec, Canada and Europe, as well as at the International Institute of Human Rights in Strasbourg, France. He is the author of many books and articles on international and constitutional law.

**Yanina Welp** is principal researcher at the Centre for Research on Direct Democracy (Centre for Democracy Studies) and codirector of the Zurich Latin American Center, both at the University of Zurich. She holds a PhD from Pompeu Fabra University, in Barcelona. Her main areas of study are the mechanisms of direct and participatory democracy and digital media and politics. She has published extensively on these topics in books, chapters and academic journals. Most recently, she co-edited *Let the People Rule? Direct Democracy in the Twenty-First Century* (coedited with Laurence Whitehead and Saskia Ruth, ECPR Press, 2017) and published journal articles in *Democratization*, *Perfiles Latinoamericanos* and the *Journal of Politics in Latin America*.



Founded in the spring of 2016, the Research Institute on Self-Determination of Peoples and National Independence (IRAI) is a non-partisan, non-profit organization. Its mission is to carry out, disseminate and make available research on the self-determination of peoples and national independence, with the aim of contributing to the scientific knowledge of this field, to educate the general public and to stimulate a peaceful, open and constructive citizen dialogue.

Fondé au printemps 2016, l'Institut de recherche sur l'autodétermination des peuples et les indépendances nationales (IRAI) est une organisation non partisane à but non lucratif. La mission de l'IRAI consiste à réaliser, diffuser et rendre accessibles des recherches sur l'autodétermination des peuples et les indépendances nationales afin de contribuer à l'avancement des connaissances scientifiques, d'éduquer le grand public et de favoriser un dialogue citoyen à la fois serein, ouvert et constructif.

Fundat la primavera de 2016, l'Institut de Recerca per a l'Autodeterminació dels Pobles i les Independències Nacionals (IRAI) és una organització imparcial i sense ànim de lucre. L'objectiu de l'IRAI és el de fer recerca sobre l'autodeterminació dels pobles i les independències nacionals i divulgar-ne els resultats al públic de manera accessible i, d'aquesta manera, contribuir al desenvolupament del coneixement científic, educar el públic i promoure un diàleg ciutadà de caràcter serè, obert i constructiu.

## ABOUT IRAI



# IRAI

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